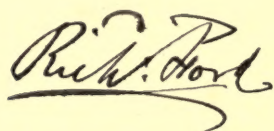


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AN
INQUIRY
INTO
THE PRESENT STATE
OF THE
C I V I L L A W
OF
ENGLAND.

BY
JOHN MILLER, Esq.
OF LINCOLN'S INN.

LONDON:
JOHN MURRAY, ALBEMARLE STREET; AND
CHARLES HUNTER, BELL YARD.
MDCCCXXV.

IN

INQUIRY

OF

THE PRESENT STATE

OF THE

OF THE LAW

IN

ENGLAND

AND

WALLES

BY

LONDON: 1811.

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CHAPTER I.

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ON THE PRESENT STATE
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THE laws of any country may be regarded in three different aspects, as they relate to the past, the present, or the future. They are considered in the first of these points of view, when they have entirely ceased to be in force, and are investigated by historians and philosophers for no other purpose than to ascertain the causes from which they arose, the changes they have undergone, and their adaptation to the state and circumstances of society at the period when they prevailed. They are considered in the second point of view, by the compilers of digests, commentaries or abridgments, who contemplate them merely as a body of municipal regulations possessed for the moment of binding obligation, and deserving as long as that continues, to be collected, arranged, and elucidated with all practicable skill and diligence. They are considered in the third point of view, when the judicial institutions and procedure actually subsisting in any particular state, are tried not by their past, but present reason-

ableness and utility ; and when an endeavour is made to determine the estimation in which the several parts of them ought to be held, either by collecting the opinions of those best qualified to judge, or by a careful observation of the practical effects which have resulted from their operation. This process forms a species of *experimentum crucis*, to which every system of law ought from time to time to be subjected, both as the fairest criterion of the real excellence of its principles and administration, and as affording the fullest and most satisfactory data for its prospective amelioration.

The following pages are intended as a specimen of the manner in which this mode of investigation may be applied to the laws of England. The difficulties with which such an undertaking is surrounded are peculiarly discouraging. In some cases, the facts upon which the reasoning proceeds are so difficult to be ascertained, and the inferences to be drawn from them so vague and unsatisfactory, that the mind can arrive at no conclusion in which it can confidently repose. In others, though the facts are clear and the deductions obvious, the interests and feelings of so many persons are so deeply involved, that with the strongest desire to state neither more nor less than the course of argument strictly requires, it is difficult to know how much to disclose or suppress, without incurring the charge of invidiousness on the one hand, or timidity on the other. In addition to this, all matters connected with the theory or practice of the law, are of such general and

paramount concernment, that the prudent part of the community, and even those whose zeal for its improvement is the most sincere and ardent, still retain decided disinclination to see them brought unnecessarily or disrespectfully into controversy. In deference to this laudable disposition, I have in various parts of this treatise, introduced a greater number of references and quotations, than many of those into whose hands it may fall, may deem either interesting or instructive. To those who are either busy or impatient, I am fully sensible how repulsive the frequent mention of authorities almost invariably proves. But I do not think I could with propriety have omitted them. Those who are engaged in the investigation of perplexing subjects, and especially such as involve the rights and interests of every member of society, are naturally well pleased to adduce the opinions of persons of approved credit and capacity, in support and confirmation of their own reasoning and deductions; and these authorities constitute at the same time the best evidence which the public can either require or receive in favour of the conclusions which they are brought to confirm.

The circumstances just noticed may perhaps be received as some extenuation of the faults with which the execution of this attempt may be chargeable. With all its defects, it will not prove wholly useless, if it should have any tendency to induce those who are more fully qualified to devote their time and talents to subjects of such incal-

culable moment to the public welfare. A variety of unconnected causes have lately conspired to bring the administration of justice into more general and keen discussion, than it has at any former period been obliged to undergo. Since this interest has been excited, every fact or argument which is unfavourable to any alteration of existing institutions has been collected and arrayed in their defence; and yet in spite of all this, a general and increasing conviction prevails, that neither the law nor the means by which it is dispensed, have received those ameliorations which the change of times and actual circumstances of society demand, and which a due degree of diligence might have conferred upon them. Both Houses of Parliament have now joined in the discussion; a considerable number of resolutions and enactments relative to this subject have been lately passed, and others of greater moment appear to be yet in preparation. These are circumstances which can neither be suppressed nor denied; and in whatever light statesmen and lawyers may affect to regard them, they have all the appearance of being the forerunners of some great change to which the law of England is speedily verging. Palliatives and expedients may retard or conceal, but cannot prevent its progress; and it may be found when too late, that the application of such fallacious remedies has been imperceptibly but inevitably tending to an ultimate subversion of its whole system, which by a deliberate, temperate, and effectual correction of its

defects might have been permanently re-established.

To obtain a complete knowledge of the nature and extent of the imperfections which may be pointed out in the law of England, it would be necessary to take a minute survey of each of the codes of which it is composed, and independent jurisdictions by which it is administered. In the accomplishment of this task, the attention would naturally, in the first place, be drawn to the chief courts of Common Law and Equity. It might afterwards be directed to the King's Privy Council, which, from the growing wealth and numbers of our colonists, as well as the incompatible duties of most of the members of which it is composed, the uncertainty of their attendance, and its own inherent imperfections, has now become altogether unfit for the duties which, as a Court of Judicature, it is required to perform. Next come the different Ecclesiastical Courts and the High Court of Admiralty; both of them presided over with great integrity and ability, but alleged to be among the most expensive ever known in any country. The courts of Great Sessions in Wales would afterwards follow;—the courts established in almost every large town throughout the country, for the recovery and redress of trifling debts and injuries;—and, last of all, the court of Quarter Sessions, upon which such numerous and fatiguing duties have been incautiously imposed, that county magistrates are likely to become both unable and unwilling to perform them. Into such an exten-

sive field of inquiry it is not here proposed to enter. The following observations will be confined to that part of the civil law of England which is now administered in the Supreme Courts of Common Law and Equity, and the attention of the reader will be directed, in the three succeeding chapters—I. To such particulars in each of these jurisdictions, whether deserving of praise or blame, as appear to be most remarkable in their Constitution, Procedure, or Doctrines; II. To some important special amendments of which the law of England appears to be susceptible; III. and lastly, To the means by which the general improvement of the administration of justice may most effectually be facilitated.

CHAPTER I.

ON THE CONSTITUTION, PROCEDURE, AND DOCTRINES
OF THE SUPREME COURTS OF COMMON LAW AND
EQUITY IN ENGLAND.

THAT the rules of *Law* do not always correspond with the dictates of natural *Equity* is so well understood, that it would be superfluous in this place to point out the manner in which this arises. Neither does it seem necessary to attempt to determine, whether the ends of justice are upon the whole more effectually answered by vesting the administration of the two jurisdictions of *Law* and

Equity in the same or in separate judges. This question has given rise, both in England and elsewhere, to more reasoning and reflection than almost any other legal topic, and men of the soundest theoretical and practical views have arrived at different conclusions on the subject. I suspect the most careful comparison of the advantages and disadvantages which flow from their union on the one hand, and their separation on the other, will not be found to lead to any uniform result. The nature and limits of the jurisdiction assumed by courts of justice in any particular country, are seldom determined at first according to any regular plan or set of abstract opinions, but, like other parts of civil government, spring up and extend their authority silently and imperceptibly, and adapt themselves so insensibly to co-existing institutions, and to the manners, customs, and prepossessions of the people who are subject to their control, that it is seldom practicable to make any fundamental alterations in them afterwards. Nor is it often prudent to attempt it. The same ends are often attainable by different, or apparently inconsistent means; and it is always better, where it is practicable, to improve those institutions with which the public is familiar, than to introduce others with which it is entirely unacquainted. As far as relates to this country, the discussion is never likely to prove otherwise than an object of attractive speculation, for when the merits and defects of our several courts of law and equity have been so long tried and understood, it would

be too hazardous an experiment to blend the two together, for the purpose of ascertaining the effect of such an unknown combination.

It is singular, that though opinion is so much divided on the expediency of the separation of courts of Law and Equity, England is the only country as far as I know, either in ancient or modern times, in which that separation has been fully effected. This circumstance may therefore fairly be urged as an argument against such a separation on the one hand, while on the other the success with which it has in that case been attended, pleads as powerfully in its favour. As far as it is possible to come to a determination on so contested a topic, it would seem that under an absolute government, or where a country is neither rich nor advanced in civilization, the separation of Law and Equity is neither practicable nor advisable; but that such a measure may prove highly eligible among a free and wealthy people, where every individual is able and willing to maintain his rights and privileges, and solicitous rather for the best than the most expeditious judgment which can be pronounced upon them. With this great benefit, the division of them is certainly attended. Each jurisdiction then knows more distinctly what its proper province is, and the jealousy and emulation which naturally subsist between them cherish that salutary spirit which neither commits encroachments itself, nor allows them to be made by others. What has taken place in the United States of North America af-

fords some countenance to this opinion. Though they have always adopted the Common and Equitable law of England in their courts of justice where there is no express local enactment to the contrary, yet both before and after the commencement of their independence, Common Law and Equity were dispensed together. While the judges acknowledged it to be their duty whenever they could to determine according to equity, as forming part of the law and in order to prevent a failure of justice, they explicitly declared that they had neither equitable forms, nor the methods of carrying equitable cases into execution.* Since that time, I have been informed, that the administration of Equity has been separated from that of Common Law in the states of New York, Massachusetts, and Vermont; and it is a fair presumption, that so many independent communities, consisting of an intelligent population, would not have ventured upon such a step without grave consideration. As the gradual introduction of Courts of Chancery into North America seems favourable to the separation between Common Law and Equity at a certain period in the progress of society, the history of our own Court of Exchequer furnishes evidence to the same effect. As it is the only supreme court in England where Common Law and Equity are dispensed by the same persons and in the same forum, it is natural to expect, that if any benefit

* Dallas's Pennsylvanian Reports, vol. i. p. 214.

results from their association, it would have elevated the character of the court of Exchequer beyond that of any concurring legal or equitable jurisdiction. The reverse of this has proved to be the case. Its reputation is undeniably inferior to that of any of its competitors, and to whatever causes the effect may be owing, it is well known that its judgments, both at Common Law and in Equity, are with few exceptions regarded as of less weight and authority than those of any other tribunal in Westminster Hall.

Assuming however that the separation of Common Law and Equity may become an expedient measure in an advanced stage of society, that expediency continues no longer than while each of these two jurisdictions adheres rigorously to the purposes of its institution. It is the business of Common Law courts in all cases to expound the law as it stands, drily and correctly. When they have done this, they have discharged their duty. With the consequences they have no concern. If, by the rules of Common Law, any party is precluded from proving important facts; if, when proved, the judge is not authorised to take them into consideration in pronouncing his decision; or if from any other cause the rules of law do not reach the substantial justice of the case, Equity steps in, and it becomes its province to afford relief. In what manner, or according to what rules this relief should be afforded, then becomes the question. To attempt to redress all injuries sustained by easy or incautious men would

be endless, and by all who are unprotected impossible. To entitle a suitor to the assistance of a Court of Equity, he is bound to shew, that justice and public utility would require every other person placed in similar circumstances to receive that relief which he thinks fit to ask. Even when the court is satisfied that its interference is necessary, the judge by whom the cause is heard, is not left entirely at liberty to pronounce that sentence, which after an examination of the whole circumstances of the case, natural equity might appear to him to dictate. The confusion and despotism to which such a disregard of precedent and practice inevitably leads, would soon be felt to be intolerable. There is reason to question whether Courts of Equity in England have not diminished their usefulness by running into an opposite extreme. Nor is the anomalous nature of its jurisdiction by any means unlikely to occasion such an error. If it is imagined that the English Court of Chancery serves at present merely to supply the defects and mitigate the rigour of the courts of Common Law, I apprehend the slightest attention to its proceedings will shew the fallacy of such a supposition. It is neither confined to this province in theory or practice. A large portion of the business which it transacts is of a nature with which Equity, in the natural and correct acceptation of that term, can have no interference. Take, for example—*trusts, matters of account, the payment of legacies, and specific performance of agreements*. Though questions re-

lating to these subjects are in England usually brought into courts of Equity, which is perhaps a more convenient forum than any court of Common Law for their determination, yet the rules according to which they have been there decided are in reality rules of law, and ought to be as strictly observed as any other rules which Common Law has recognised. It is the constant application of rules of this description, which has perhaps induced courts of Equity imperceptibly to extend the same rigorous adherence to precedent, to cases which are truly of an equitable nature. Even where cases are confessedly equitable, certain landmarks must be laid down by judges for the uniformity of their own procedure. All this admits of no question. The real difficulty is whether these landmarks and the decisions in which they first become discernible or settled are not now followed with too much servility. If a case occurs, which judge after judge confesses to be a proper subject for equitable relief, but that he is not at liberty to run counter to the uniform stream of practice, or is debarred from administering it for want of jurisdiction, the understanding begins to wonder for what end courts of Equity were created at all, and how their name is so strangely at variance with their practice. It is as prejudicial for courts of Common Law to become too mild, as for courts of Equity to assume too much severity. It is in the invariable observance of that line of demarcation which has been fixed between them, that the whole advantage

of any separation consists. No emergency can arise in which it can without detriment be disregarded. When Courts of Law relax their rules from considerations of natural equity, and the rules of Courts of Equity become so inflexible that they preclude that relief which was the sole object of their institution, the separation of the two jurisdictions has degenerated into one of the most inconvenient and oppressive expedients that ever was adopted for the distribution of justice.

Having made these preliminary observations, we shall now proceed to make some inquiry into the Constitution, Procedure, and Doctrines of the supreme Courts of Common Law and Equity; beginning on each occasion with the Courts of Common Law, the harshness incidental to whose judgments it is the principal business of Courts of Equity to correct.

SECTION I.

Of the Constitution of the Supreme Courts of Common Law.

THE supreme courts set apart for the administration of Common Law in England are, the Courts of King's Bench, Common Pleas, and Exchequer, the last of which serves as a court of Equity as well as a court of Common Law. The points respecting them which it seems most im-

portant to notice are, 1. The number of judges of which they are severally composed; 2. The times during which they severally sit; 3. The actions that may be brought in each; 4. The persons that practise in them; and 5. The duties and emoluments of their inferior officers.

1. The number of the judges of which each of the Courts of Common Law consists.—There is nothing within the sphere of jurisprudence, about which greater diversity of sentiment seems to have prevailed in different countries, than the number of judges best fitted to constitute a court of justice. Scarcely any two states, in past or present times, can be pointed out who have agreed upon it. In England, the number of the judges is entirely dependant on the will of the Crown, and has varied under different reigns in all the three Common Law Courts.* This fluctuation appears to have been greatest in the Common Pleas, which in ancient times was the chief court for the determination of questions of Common Law, and there the number of judges has varied from three to nine, according to the quantity of business which they had to dispatch. James I. during the greater part of his reign, appointed five in the courts of King's Bench and Common Pleas, in order to have the benefit of a casting vote in case of a difference in opinion;† and, for once, the fondness of that monarch for metaphysical states-

* Dugdale's *Origines Jurid.* c. xviii.—Madox's *Hist. of the Exchequer*, p. 743.—Hargrave's *Law Tracts*, p. 297.

† Blackstone's *Commentaries*, v. iii. p. 40.

manship seems to have guided his judgment aright. For the last century and a half, each of the three courts has consisted of one chief and three puisne judges. Why they should have been made to consist of four, in preference to any other number, it is not easy to discover, as an equality of votes is attended with obvious practical inconveniences. Should this equality happen in case of an appeal from an inferior court, the decision of the inferior court stands; and if the question before them is a point which has been reserved for their opinion when the cause was tried on the circuit, no judgment can be pronounced at all. The first of these results is unsatisfactory to the suitor and the country; the second is still more so, and tends to throw discredit on the dignity and consequence of the court itself. Either five or three seems preferable, especially the latter, and that is the number to which the judges in all the courts of Common Law may now be said to be virtually reduced. One of the judges of King's Bench since the 57 Geo. III. c. 11. sits apart from his brethren as long as is necessary in the forenoon for the justification of bail, on all days in the week in term time, except those which are called *paper days*; and another goes to attend Chambers in Serjeant's Inn at three, to dispose of the irksome and increasing business which was formerly dispatched there in the evening. The Chief Justice of Common Pleas was in the beginning of 1824 empowered by royal warrant to sit during the session of parliament to hear appeals in

the House of Lords; and the Chief Baron of Exchequer is authorised by 57 Geo. III. c. 18. to sit alone at his discretion as a judge in Equity, while the three puisne barons continue to dispatch the ordinary business of the court. This practice of withdrawing judges to another place for the purpose of performing extraneous duties, while the courts are sitting of which they still remain constituent members, is of recent origin, and seems one of the most unadvisable alterations which has ever been introduced into English judicature. It raises surmises in the minds of suitors and practitioners that causes are lost or won according to the casual presence or absence of particular persons among those whose province it is to decide upon them; it unhinges the minds and distracts the attention of the judges themselves; and almost conclusively proves that the number of persons who are made to constitute a court is a matter deserving of no consideration. If two or three be found to answer as well as four, there can be no reason why four should be appointed at all; and if four are necessary, as it is impossible to tell at what hour important questions may arise, they ought all to attend during the whole sittings of the court, to deliver their opinions on every matter which is brought before them.

2. The times at which they usually sit, and the length of their sittings.—Each of the three Common Law courts sits in Westminster Hall every day, except holydays, during the four yearly law-terms, each of which terms lasts on an average

about three weeks. Two of them are fixed and two moveable. Michaelmas term always begins for the dispatch of business on the 6th of November, and ends on the 28th of November; and Hilary begins on the 20th of January, and ends on the 12th of February. Easter and Trinity are moveable. The time during which courts of justice sit must naturally be dependent on the number and intricacy of causes brought before them; but the court of King's Bench usually sits in term time from four to six hours every day. The court of Common Pleas sits an hour or two less than King's Bench, and the court of Exchequer as much less than that of Common Pleas. As the stated terms have of late been found insufficient for the dispatch of business, any three or two judges of King's Bench were in 1822, empowered by 3 Geo. IV. c. 102. to sit by royal warrant at Serjeant's Inn, Westminster Hall, or any other convenient place, on as many days in the interval between any two terms, as his Majesty may appoint, "for the dispatch of such matters as might then be depending in the said court, whether on the crown or plea side thereof;" and warrants have been regularly issued for that purpose ever since the act was passed. Before and after and sometimes also during term-time, the Chief Justices of King's Bench and Common Pleas, and the Chief Baron of Exchequer, sit alone at Nisi Prius; the two former at Westminster and London, and the latter in Westminster only, as often as may be requisite,

for determining causes which require the assistance of a jury. Besides this, the Common Law judges have the labour of trying civil and criminal causes which are brought before them in the course of the spring and summer circuits. For this purpose the whole of England is divided into six circuits, two of the judges being appointed to each circuit, not according to the court in which they sit in Westminster Hall, but as their own convenience or the public service may render most desirable. The commencement of the summer circuit, like that of Easter and Trinity terms, depends upon the feasts of the calendar: being nearly a month earlier in some years than others. The circuits in North and South Wales do not take place at exactly the same time with those in England, nor are those who preside in them invested with the same rank and dignity, but are merely practising barristers specially appointed to officiate on that occasion, and returning afterwards to their usual practice at the bar. That a superior class of judges should, in the present day, be employed in England and an inferior one in Wales, for administering the same law, in questions of the same nature, and under the same government, seems neither reasonable nor becoming. It is certainly true that several persons, whose opinions are entitled to the greatest deference, have defended the continuance of separate circuits for Wales, upon reasons drawn chiefly from the difficulty of apportioning the Welsh counties conveniently among the other cir-

cuits, and from alleged peculiarities in the manners and customs of the people. Though these reasons may fail to produce conviction, they shew that frequent reflection combined with extensive local knowledge are requisite in order to arrive at a sound conclusion on subjects of this nature. The appointment of one sort of judges to go the circuits in England and another in Wales, is not the only subsisting judicial arrangement mentioned under this head, of which the propriety may be questioned. The irregularity of the times at which the summer circuit as well as Easter and Trinity terms commence, together with the insufficient length of the ancient law-terms for the dispatch of the present accumulation of business, are well worthy of consideration. In a country like this, where every kind of communication is so rapid, and where the activity and industry of the whole community requires every man to adjust his movements with the greatest exactness, it becomes an object of the utmost importance to introduce uniformity and regularity into every department of government. If the beginning of two terms is fixed, why should not that of the circuits and the other two be fixed also? Particular periods might be pitched upon for that purpose, which the season of the year, country business, and the convenience of suitors and witnesses rendered most expedient; and if it were properly selected, it is most likely that all parties concerned in the administration of law, would find themselves benefited by the change. The extension of some or all of the present law-terms

seems equally urgent. If the arrear of business is temporary, let a temporary remedy be applied; but if the increase is permanent, there can be no reason why the remedy should not be permanent also. Instead of the judges holding a kind of surreptitious sittings before and after term, in Serjeant's Inn, Gray's Inn, or any other place, where they may be able to procure admission, it would be more convenient for themselves that their termly sittings in their own courts should be permanently and openly prolonged, and at the same time more acceptable to the public that the dispensation of justice should on no occasion be removed from Westminster Hall, as that is the place which immemorial usage has consecrated in the eyes of the people as their general judgment-seat.

3. The causes of which each of the Common Law courts has cognizance.—On this point there is no occasion to enlarge. Without advert-
ing to the peculiar duties which each of them is supposed to have originally discharged, it may be enough to mention that the court of King's Bench still retains exclusive jurisdiction in all criminal actions denominated pleas of the crown, in writs of error from the Common Pleas, and other inferior courts of record, and in the trial of issues joined in the petty bag. The court of Common Pleas has similar power in fines and recoveries; in actions of waste and real actions, both of which are now extremely rare; and in the outlawing of defendants in certain actions of a personal nature.

When the court of Exchequer sits as a Common Law court, it has exclusive jurisdiction in all matters belonging to the revenue of the crown. Actions not connected with any of these subjects may be brought in any of the courts of Common Law the suitor pleases; but a particular fiction must be used in case they are brought in King's Bench or Exchequer. The fiction of King's Bench is, that the defendant is then in the custody of the Marshal of the Marshalsea prison; while that employed in the Exchequer is, that the plaintiff is the King's debtor, and will not be able to pay the King his due, unless he receive his own from the defendant. The fees of inferior officers, the steps of procedure, and the expenses incurred in the prosecution of an action, vary considerably according to the court in which it is brought and the form in which it is conducted. Both these particulars might advantageously undergo alteration. Fictions in law should never be tolerated farther than is absolutely necessary; and nothing could tend more to give satisfaction to the suitors, and promote an equal division of labour among the different courts, than that justice should as far as possible be dispensed in all of them, with the same skill, according to the same form of process, at the same expense, and with the same expedition. It is owing in some measure to a departure from this principle, that the court of Exchequer has hitherto rendered less assistance, either to the courts of Common Law or Equity, than might have been expected from it. Every

one at all acquainted with its formation or character is aware, that there are various causes co-operating to its disadvantage. Among these some antiquated regulations to which it still adheres, and in particular certain exactions of the clerks in court, which are said not to be allowed either in King's Bench or Common Pleas, are alleged to have considerable influence. Change this system; adopt the most proper means for making the court of Exchequer capable and accessible, and it will soon rise more nearly on a level with its fellows. As things now stand, tithes and revenue causes constitute almost the only laborious business which is brought before it. Perceiving this to be the case, the House of Lords has proposed, "that the execution of matters arising out of local " and private Acts of Parliament relating to canals, " navigations, aqueducts, avenues to bridges, in- " closures, docks, railways, tram-roads, opening " and paving streets, supplying towns with wa- " ter and gas, and various other speculations,"* should be withdrawn from other courts of Equity, and confined exclusively to the court of Exchequer. Those by whom this plan is recommended must have laboured under some sort of misconception. The management of the whole railways and tram-roads in the kingdom, together with the water, gas, and other speculations specified in the Report, although they make a formi-

* Lords' Report on the Appellate Jurisdiction of the House of Lords, in 1823, p. 10.

dable appearance upon paper, form in reality but a trifling part of the burden under which the courts of Equity are now groaning. The removal of that sort of business therefore would hardly be any perceptible relief to them, and its acquisition could confer little additional credit upon the court of Exchequer. But even if the suits here mentioned had been as burdensome and difficult as they are otherwise, the forcible transference of them from one court to another by legislative enactment, would only have become the more objectionable. Where only one court of competent jurisdiction is established, the suitors must necessarily be satisfied with its decisions; but where several of these are open at the same time, and the use of all except one is prohibited by legislative authority, such a proceeding appears to be in opposition to every principle of private right and public freedom.

4. The persons who are entitled to act in them as practitioners.—All students of law who have been called to the bar, are entitled to practise in all the supreme courts, both of Common Law and Equity; and all attornies and solicitors are entitled to practise in those courts of Common Law and Equity on the rolls of which they are entered. To this general rule there is only one exception: No barrister is permitted to practise in the court of Common Pleas in term-time, who has not been raised to the degree of a serjeant-at-law. This order is of great antiquity; and at a distant period, when the court of Common Pleas, according to Lord Hale's expression, was "the great orb,

“ wherein the greater business between party and party did or should move,” it was of prime importance, and both then and in later times, a considerable portion of its members have ranked as high in point of legal and constitutional learning as any individuals of whom this country can boast. Those days have long since passed away. The bulk of the questions now brought into courts of Common Law are of a nature totally different from those of which the court of Common Pleas has exclusive possession. The serjeants have consequently sustained a great decline both in fame and fortune.

Fuimus Troes. Fuit Ilium : et ingens
Gloria Teucrorum. Ferus omnia Jupiter Argos
Transtulit.

They may lament, but cannot counteract the change. The suitors now repair to other courts, where all barristers have a right to be heard, and where any individuals may be selected from among them, to whom they think their cause may most advantageously be entrusted. Why then is this fraternity continued? It is injurious to the bar, as the length of standing required for admission, and heavy charges consequent upon it, must prevent persons from making application for that purpose who are well entitled to it; and even when application has been made, the power which the Lord Chancellor possesses of granting or withholding it, gives him a controul over the profession of the law, with which no conscientious public

officer can desire to be invested. It is even more injurious to the general usefulness of the court than to the interests of the bar. Those who have a monopoly of legal argument are as likely to become careless or inexpert in the management of their business as monopolists of any other description, and it is not natural to suppose, that so many causes will be heard before a tribunal where there are only ten or twelve practitioners as where there are two or three hundred. When there is so much necessity as exists at present for increasing the efficiency of all courts of justice, one is surprised how so complete a specimen of legal monachism has been permitted to outlive the eighteenth century. The proper period for the dissolution of the order would have been in 1731, when the 4th Geo. II. c. 26, abolished the old law-hand writing, law French, and law Latin.

5. Their Inferior Officers.—It does not fall within the limits of this inquiry to enter into a detailed examination of the number, duties, and emoluments of the various officers attached to the Common Law Courts of Westminster Hall. Upon the whole, there is perhaps less amiss in this department of the administration of justice, than, under all circumstances, might have been expected. A slight inspection of it however will suffice to shew, that in the three courts taken together there are to be found upwards of forty officers, who levy at least £30,000 a year on the public, whose places are either complete sinecures, or where the profits so exorbitantly exceed the labour, as to stand urgently in need of reformation.

Among the last class may be mentioned the Marshal of the King's Bench prison, who, though he ranks as nearly the lowest officer in the court to which he is attached, is generally supposed to derive a larger income from his office than that of the Chief Justice, whose prison he is appointed to keep. Perhaps no other situation could be named, where the nature of the service and its remuneration are on so preposterous a footing as this; but there are many to be found where there is a complete inversion of the ratio they ought naturally to bear to one another. A few of these offices are hereditary; some are in the gift of the two Chief Justices and Chief Baron, or Chancellor of the Exchequer; while others are avowedly sold by the Chief Justices as a matter of right when they become vacant, and the money which is received from the sale of them forms as regular a part of the profits of their office as the provision set apart for their support by the legislature. It ought at the same time in fairness to all who have been engaged in such transactions to be observed, that scarcely any instance has for many years occurred, where any person who has been permitted to become the purchaser of a legal office, has failed in the proper discharge of the duties incumbent on him to perform. Nothing can speak more strongly in favour of the feeling which prevails on such subjects, or of the salutary influence of publicity and responsibility. The usage itself continues, as it previously appeared to be, utterly indefensible. It appears by the Calendar to the Journals of the

House of Lords, that so long ago as the time of Edward VI. the Commons for a considerable time insisted on the rejection of that clause in the 5th and 6th of that king's reign, which allows the two Chief Justices to sell certain offices,* and it is much to be lamented, that their efforts should have been unsuccessful. As a means of subsistence for the judges themselves or the members of their families, it is in the highest degree unequal and precarious; and even though this objection were removed, it would still remain a species of traffic, in which it is not desirable that any minister of justice should be either permitted or tempted to engage. The plain rule to be observed on the subject is, that no offices should exist in any court of law, but such as are indispensably necessary. Those should be gratuitously conferred upon the persons best qualified to fill them, who, in return, should be required to do the duty in person, and never allowed to do it by deputy. The observations which Lord Hale has made on the officers of the Court of Exchequer are well worthy of attention. "There are, at this day, many great officers that receive the profit and fees of their office, and either do not at all attend to it, or know not what belongs to it, but only perchance once a term sit with some formality in their gowns, but never put their hands to any business of their office, nor indeed know not how. These, and some other nominal officers, are great men, enjoy

* Barrington's Observations on the Statutes, p. 530.

“ their pleasures, understand not or attend not to
“ their offices, but dispatch all by deputies; and
“ by this means an unnecessary charge is drawn
“ upon the king and his people; for the chief officer hath the profit, and the deputy he hath some,
“ or else he could not live. If these offices are not
“ necessary, why are they continued? If they
“ are, why should they not be executed at the
“ charge only which accrues from the deputy, and
“ the benefit of the nominal officer that doth nothing be retrenched as a useless charge? The
“ things that would be convenient in this business
“ which would possibly remedy it, are—1. To reduce the perquisites of these offices to such a
“ medium as might be sufficient for them that execute the business; and to pare off that superfluous
“ redundancy, which serves only to maintain
“ an idle grandeur that sits still, and doth nothing
“ but take the account of their perquisites at the
“ term’s end. 2. That all persons that are to be
“ appointed officers be personally resident upon
“ their office, and not to perform by deputy; and
“ no office of this kind to be granted to be exercised
“ by deputation. 3. That all these offices may be
“ granted to men educated and experienced, and
“ not to courtiers or great men. 4. That there
“ be no sale of offices of this nature. *I do speak it*
“ *knowingly*. The king loseth five times more by
“ any such office that he sells, than the profit
“ amounts to; and it is the dearest gratification of a
“ courtier or servant that can be imagined, and
“ the greatest detriment to the king, when an of-

“ fice is made the reward of that man’s service
“ that knows not how to use it. It were more
“ profit to the king to bestow a pension to the
“ value of the office to such a person; and when
“ he hath done, to bestow the office upon an ho-
“ nest man that knows how to use it. It is true I
“ know many offices are already filled in this kind;
“ and reversions upon reversions granted; and an
“ act to remedy it for the future, only were to
“ make a provision to begin the next age. It were
“ worth a present provision, and an inspection to
“ be made at present, and resumption by act of
“ parliament to remedy it, with allotment of some
“ moderate pensions to some that would be re-
“ moved upon this account; and I believe the
“ king nor people would be no losers by it.”*

The remarks here made on the offices in the court of Exchequer are applicable to every office in every court whatever. Whether the patronage or sale of them is vested in the king, or any private person, is of little moment. The burdens they impose upon the country are the same in both cases, and as soon as any offices are demonstrated to be useless or inadequate, it is equally wise in point of policy, and economical in point of management, to buy up all interests in them then subsisting, in order that the offices themselves may be either remodelled or abolished.

* Hale on the Amendment of Laws, printed in Hargrave’s Law Tracts, p. 279.

SECTION II.

On the Constitution of the Supreme Courts of Equity.

THE High Court of Chancery and the Court of Exchequer are the only supreme courts of equity in England. The chief part of the important suits which are brought into Exchequer in its character of a Court of Equity, relate to the subject of tithes; and as probably not a tenth part of the business, either in point of quantity or difficulty, which arises in equity is there disposed of, it happens that whenever courts of Equity are mentioned, the Court of Chancery is generally supposed to be understood, and to it therefore the following observations are almost exclusively directed.

The three tribunals of the Lord Chancellor, Master of the Rolls, and Vice Chancellor, which are now established in Chancery, form but one court, over which the Lord Chancellor presides, with very extensive powers of superintendence and controul. All bills of complaint are now addressed to him, though in antient times they were to the Master of the Rolls;* and the Master of the Rolls and Vice Chancellor, however high and responsible officers, are, according to the present constitution of the Court of Chancery, only regarded as assistants to him in discharging the duties of his exalted station. At the same time,

* Discourse of the Judicial Authority of the Master of the Rolls, p. 63, et seq.

as it is generally in the power of the plaintiff to have a cause set down and heard in the first instance either before the Lord Chancellor himself, the Master of the Rolls, or Vice Chancellor, the courts of these judges may for most practical purposes be considered as possessed of independent and concurrent jurisdiction. If, however, a greater number of causes are set down before the Chancellor than he is able to dispatch, he is empowered by the 53 Geo. III. c. 24. which created the office of Vice Chancellor, to transfer from himself to the Vice Chancellor the hearing of *all causes, matters, and things*, which in his discretion he may see expedient. He has not the same power over the Master of the Rolls, but may require that judge, as well as the Vice Chancellor, to preside for him, when absent from indisposition or any avocation incidental to his other duties. The Master of the Rolls is superior in point of rank to the Vice Chancellor, but no official connexion has been established between them. Each of these three judges may, if he thinks proper, rehear a cause which he has already heard, upon an application being made to him for that purpose. This rehearing is a proceeding familiar to the court of Chancery, and which, as it has been hitherto moderately used, it would be unadvisable to abolish. When a cause has been finally disposed of either upon hearing or rehearing in any of the three courts in Chancery, a dissatisfied party is always permitted to appeal; but the court before which the appeal is then brought depends upon the court in which

the hearing or rehearing has taken place. If it has been before the Chancellor in his own court, the appeal must be made directly to the House of Lords; but if it has been before the Master of the Rolls or Vice Chancellor, an appeal may be made either directly to the House of Lords after receiving the Chancellor's signature, which is necessary in point of form, as every decree enrolled in Chancery is still supposed to be his;* or first to the Lord Chancellor sitting in his own court, from whom, as well as in the former instance, an appeal lies to the House of Lords afterwards. This appeal from the Master of the Rolls and Vice Chancellor to the Lord Chancellor sitting in his own court, considering that there is also a subsequent appeal from the Chancellor sitting in his own court to the same Chancellor sitting as President of the House of Lords, is of extremely questionable utility. The reason of it evidently is, that any error which has been committed by the Master of the Rolls or Vice Chancellor may be more cheaply and expeditiously rectified, than by an appeal to the House of Lords as the court of ultimate resort. In this respect there is no doubt it does considerable good, but the difficulty is, whether in other respects it is not productive of infinitely greater harm. The history of judicial establishments in every country shews, that the love of appealing invariably increases with the

* Discourse of the Judicial Authority of the Master of the Rolls, p. 122, ascribed to Sir Joseph Jekyll.—The Legal Judicature in Chancery stated, p. 45.

multiplication of the stages of appeal, whether there is any just cause for appeal or not. The consequence is, that the care which is bestowed in selecting judges for those courts from which an easy appeal lies, and the labour and anxiety of the judges who are selected in forming their opinions, is diminished in exact proportion to the diminution of the weight which is attached to them in public estimation. The Lords' Committee have accordingly suggested* that an appeal from the Master of the Rolls or Vice-Chancellor to the Lord Chancellor might in certain cases be advantageously discontinued. The more the subject is examined, it will probably become the more apparent that it would be expedient to abolish it altogether. As long as such power of appealing continues, one of two consequences must happen. Appeals will either be rare or frequent. If they are rare, they will only occur in cases of great difficulty and moment, which might be decided by the Chancellor in the House of Lords, with the assistance of the peers who might be in attendance, as easily and expeditiously, and at as little cost to the parties, as in the Court of Chancery. If they are frequent, the inferior court can give little assistance to the superior in the dispatch of business; and as an ultimate appeal still lies from the Chancellor in the Court of Chancery to the Chancellor in the House of Lords, as well as to the Chancellor in the Court of Chancery from

* Report on the Appellate Jurisdiction of the House of Lords, p. 7.

the Master of the Rolls and Vice-Chancellor, the chief effect of this arrangement is, that it creates two steps of appeal instead of one, which every one practically acquainted with legal business knows to be more wasting and oppressive to the suitor than can readily be imagined. Even if it should be conceded to be right, that there should be an appeal from the Master of the Rolls and Vice-Chancellor, first to one jurisdiction and then from that to another, the very notion of an appeal implies that the first appeal ought to be decided by a different person from him who decides the second. But here the first appeal is to the Lord Chancellor sitting alone in Chancery, and the second to the same Lord Chancellor presiding in the House of Lords, where, though he sits only as an individual peer, it is universally known that he does and must of necessity exercise a preponderating influence, or he will soon cease to preside at all. It is no defence of these successive appeals, to allege, that where the Chancellor has pronounced a decision in his own court in Chancery, in an appeal from the Master of the Rolls or Vice-Chancellor, it will seldom happen that the same cause will again be brought before him by appeal in the House of Lords. No part of judicial procedure ought to depend on such contingencies. There is not a suitor in the court of Chancery who may not now be dragged through every stage of these successive appeals by a wealthy or vindictive adversary; some of them will, and none of them ought, to be subject to such a visitation. No

man should have it in his power to expose another to two appeals, either the first or last of which appear to be so completely nugatory. They have sometimes been denied to be nugatory, and it has been insisted that if a cause should come upon appeal before the Lord Chancellor in the House of Lords, which he has decided originally either in his own court in Chancery, or upon appeal from the Master of the Rolls or Vice-Chancellor, he will be found to examine it with as laborious and unbiassed consideration as if it had been brought before him there in the first instance. That his consideration will be laborious is indisputable; that it will be altogether unbiassed may be fairly questioned. No human mind is always exempt from bias of some sort or other, and perhaps no occasion could be named on which its influence is so secret and irresistible as when a judge reviews his own solemn judgment. But supposing the Chancellor sitting as a judge in the House of Lords to be as unbiassed as could be desired, the objection which has been urged against the present course of appeal remains undiminished. When a judge rehears a cause in which he has made a decree, the rehearing is a sort of appeal which it may be useful to allow, in order to correct any error which from inadvertence or want of information may occasionally be committed. But though this may be denominated an appeal, it in fact amounts to no more than a revision by the court of its own order. There can be no change of the court, and except by death or removal no

change of the judges. But an appeal from one court to another is a proceeding of a totally different nature. It necessarily implies that the court to which the appeal lies, is of a superior order, and, what is of far more importance, that those who are the efficient judges in it should either individually or collectively be presumed to possess superior attainments. In an appeal from the Chancellor to the House of Lords, the second of these requisites is obviously wanting. The judge who decided the appeal in the first court is the same who decides it in the second, without his authority being entitled to the smallest additional respect, except that which he derives from the dignity of the house in which he is seated. The reconsideration which the Chancellor is willing to give, is precisely that which appellants are anxious to avoid, and it will be difficult to find one among them who submit to it without reluctance. Though this double appeal to the Chancellor has not hitherto been made the subject of serious complaint, that circumstance is no proof of the propriety of its continuance. What was expedient formerly may have become inexpedient now, or that which is inexpedient now may have been inexpedient always, though its inexpediency may have only lately been detected. All our institutions are more closely scrutinised than they used to be, and the determination which is evinced to elicit from them the whole good or evil to which they can be made subservient, causes their merits and demerits to

be tried with greater accuracy. Should it appear therefore to those who reflect on the subject that there is solid ground for the objections which have now been urged against an appeal to the Chancellor in his own court, and another to the House of Lords afterwards, where the same judge exercises a predominant and generally unresisted influence, it is to be hoped that the earliest opportunity which presents itself will be embraced, of putting an entire stop to appeals from the Master of the Rolls and Vice-Chancellor to the Chancellor in his own court, of which the Lords' Committee have already recommended the partial discontinuance.

Having said so much on the court of Chancery in general, it remains to examine the three tribunals of which it consists, in each of the respects in which courts of Common Law have already been considered.

1. Of the number of Judges of which they consist.—As the Lord Chancellor, Master of the Rolls, and Vice-Chancellor each sits alone in his own court, it is natural to inquire how it happens that, while each of the supreme Common Law courts has four judges, the three chief courts of Equity, whose duty is at least equally difficult and laborious, should only be supplied with one. This circumstance will be easily accounted for by attending to the manner in which the jurisdiction of the court of Chancery was originally assumed and has subsequently been extended. There was at first no other judge in Equity except the

Chancellor. This officer was created by the later Roman emperors, adopted by the Roman church, and retained in almost every European state into which the Roman empire was at last divided. Though the name remained the same, a material change gradually took place in the duties of the office. What those duties necessarily became, either in other countries or our own, is a subject of considerable historical curiosity but little practical use. It may be sufficient generally to mention, that in England as well as other places, they gradually acquired very high rank and authority as officers of state, and particularly in all matters connected with the administration of justice. The powers given to the Lord Chancellor Preston, in the time of Richard II. as expressed in his patent granted in 1391, appears to have extended *ad omnia et singula quæ ad expeditionem legum et bonum regimen terræ necessario requiruntur*.* The superintendence here delegated is quite as ample as that which is vested in the Chancellor at the present day, and the exercise of it probably formed in that age his chief judicial occupation. It was not till about fifty years afterwards that bills are found addressed to him sitting as a regular minister of justice in his own court; and as it was probably not anticipated that this new duty would impose upon him any serious burden, he continued to discharge the functions of his office without any public assistance. But though

* Patent Rolls, 15 Ric. II. pap. 1. quoted in one of the Treatises printed among the Law Tracts edited by Mr. Hargrave, p. 309.

the Chancellor has never had any judges sharing his power on the bench as associates, he appears even at a remote period to have had persons placed around him to whose aid he could recur in cases of peculiar intricacy. In an anonymous treatise printed by Mr. Hargrave from Petyt's manuscripts deposited in the library of the Inner Temple,* it is supposed that the Masters in Chancery were appointed, among other purposes, to give their advice to the Chancellor in Civil and Canon Law causes as well as those of Common Law, and the high rank and consequence which Masters in Chancery at one time enjoyed, bestow considerable probability upon this conjecture.† Two of them still attend him daily at the opening of the court, and also take their place with him on the woolsack in the House of Lords. But this attendance has long degenerated into mere formality. The Master of the Rolls, who was always acknowledged to be their chief, is the only one among the Twelve Masters with whom the Chancellor has for the last 150 years consulted in points of real difficulty. He still occasionally resorts to his assistance and that of such of the Common Law judges as he may request to be present at the discussion of questions unusually complicated and important; but he has uniformly taken care to intimate that this step has only proceeded from anxiety to inform his own mind, and not in any degree to guide the judgment he might ulti-

* Hargrave's Law Tracts, p. 298.

† Spelman's Glossary, p. 108.

mately feel himself bound to deliver. Nothing can be more explicit than the language of Lord Chancellor Nottingham in the Duke of Norfolk's case, when he made a decree in direct opposition to the concurring opinions of the Chief Baron and two Chief Justices by whom he was assisted. "What hath been said here at the Bench on both sides," said he, "has been taken in short hand and made public. I know the counsel on both sides hath seen it, or will see and look into it well, and if they can give me any reasonable satisfaction that I am in the wrong, I shall easily recede from it. But upon any thing yet offered I am of the mind I was. As to the learned judges that assisted me at the hearing, the decree is mine, and the oath that decree is made upon is mine. Theirs is but learned advice and opinion. And therefore if they can satisfy my conscience that they are in the right and I am not, well and good. If not I must abide by that decree according to my conscience."* In such an emergency Lord Nottingham still held himself bound by the oath he had taken to maintain a jurisdiction which had then become vastly more critical than when it was first assumed, but which successive Chancellors have now exercised singly for upwards of four hundred years.

As the judicial business in Equity which was brought before the Chancellor, soon increased so much that he became unable to dispatch the

* Select Cases in the High Court of Chancery, p. 39.

whole in his own person, it was found necessary to consider upon whom the least important part of it could be devolved; and as he himself had always sat singly, it was natural to expect that the subsidiary assistance called in, should consist of a single judge also. This actually proved to be the case, and the person to whom recourse was almost invariably had on such occasions was the Master of the Rolls, who had always been the chief of the Twelve Masters in Chancery, and seems also to have been the Chancellor's principal adviser in matters of law, for a considerable antecedent period. Whether the Master of the Rolls sat originally as a judge in Equity in right of his own office, or merely as deputed in each particular instance by the Chancellor, is a subject which has given rise to much controversy and investigation.* The title which he sometimes received of King's Vice-Chancellor and Vice-Chancellor of England;† the special delegation of power which appears from the Records of the court of Chancery to have been frequently committed to him by the Chancellor;‡ and the number of special commissions which have been granted to the Master of the Rolls by the crown to hear

* *Discourse of the Judicial Authority of the Master of the Rolls*, passim. Ascribed to Sir Joseph Jekyll, Master of the Rolls. — *The Legal Judicature in Chancery stated*, passim. Ascribed sometimes to Master Spicer, and sometimes to Lord King.

† *Discourse of the Judicial Authority of the Master of the Rolls*, p. 23.

‡ *Legal Judicature in Chancery stated*, p. 129 et seq.

causes in the absence of the Chancellor;* make it most probable that the jurisdiction which he thus exercised as a judge in equity, was at first only a voluntary deputation granted by the Chancellor, which gradually acquired strength from usage, and was at last fully established by the commissions which subsequently issued from the crown. Whether this was so or not, it is certain that he did not sit publicly as a judge in Equity, until the press of equitable business before the Chancellor required assistance, and highly probable that he then sat singly, merely in imitation of the judge for whom he acted as a substitute. His jurisdiction gradually extended with the accumulation of suits in Equity, until few matters relating to them remained, which could not be heard and determined in the first instance at the Rolls, as well as in the Lord Chancellor's own court. In this manner these two judges, singly in their respective Courts, continued to transact the whole matters which arose in Chancery during the lapse of nearly three centuries.

In 1813 the arrears of business became so great, that the establishment of a third court in Chancery became unavoidable. A new judge was created for it with the title of Vice-Chancellor of England, which about two centuries and a half before had been sometimes given to the Master of the Rolls, and whatever difference of opinion prevailed in the public mind respecting the necessity

* *Judicial Authority of M. R.* p. 86.—*Judicature in Chancery stated*, p. 143.

or expediency of the court itself, there was none about the number of persons of which the court should consist. The country had been so long accustomed to the Chancellor and Master of the Rolls sitting alone in their own courts, that the appointment of one judge to the new court was regarded as a mere matter of course, about which there could be no difficulty or difference of opinion.

Whether it be owing to the fortuitous circumstances now mentioned or not, that only one judge is to be found in each of the three separate tribunals into which the High Court of Chancery is now divided, it is of much greater importance to ascertain whether one judge is really better fitted for conducting the business of a court of Equity than any other number of which it might be made to consist. If three or four judges are requisite in a court of Common Law, it has been asked why a single judge should be thought adequate to the administration of a court of Equity, where the questions which arise require perhaps still deeper legal knowledge and investigation. It must be admitted, that the uncontrouled authority possessed by a single judge must necessarily give him a command over suitors and practitioners, which it would be dangerous to communicate to one who is precipitate, ignorant, or vindictive.—But the very conspicuousness and responsibility attached to the station of single judges, makes those who choose them extremely careful in their choice, and those who are chosen peculiarly dili-

gent and exemplary in the performance of their duty. Owing to this circumstance, the functions of those judges who sit alone have hitherto been discharged in this country with so much ability, that it is exceedingly uncertain whether the addition of two or three colleagues to each would have been attended with any public benefit. Neither the judgments of the four Barons sitting together in Equity in Exchequer, nor those of the three Commissioners to whom the custody of the Great Seal has been from time to time intrusted in the interval between the resignation of one Chancellor and appointment of another, are at all favourable to the supposition that a plurality of judges in Equity would be preferable to one. It is true the court of Exchequer, from its mixed judicature and other causes, may not be thought a fair specimen of what a court of Equity consisting of several judges is calculated to become; and it may be alleged that the Commissioners of the Great Seal have hitherto been prevented by the temporary nature of their appointment, from displaying that decision and energy, which they would have exerted, if it had been more permanent. Nothing however connected with these examples, nor any facts which have hitherto been produced, at all favour the supposition that courts of Equity where there is a plurality of judges, are possessed of any advantage over those where there is only one. The judgments given by single judges in the court of Chancery, where complicated points of law and equity have been brought into discussion, have in

general been deemed as sound and elaborate, as those which have been pronounced in any other court where the judges have been more numerous. I am aware that this opinion is contrary to that which is entertained by several writers whose information and reflection intitles them to the greatest respect. Muratori has observed, “*quelle decisioni che vengono da un’ solo giudice, poco o nulla s’han da credere differenti da i consulti d’un avvocato. Più stima da gran lungo meritano quelle, che escono da un corpo di varii giudici, e tanto più se giudici di tribunali eccelsi, come è la Ruota Romana, e i Senati delle più cospicue città.*”^{*} This observation would probably not have been made, if Muratori had sufficiently reflected on the weight of business which a single judge of approved capacity and integrity, acting under the inspection of a jealous and enlightened public, is qualified to perform; if he had personally observed the unfeigned and universal deference which may be paid to his authority; and if he had been made acquainted with the severe and unrelaxing application with which he may labour to deserve it. On the qualifications of the individual selected the whole merit of a single judge depends. If single judges are destitute of the temper and attainments which are requisite, they must necessarily be more exposed to error than if they sat along with others who might correct their precipitation and mis-

* *Diffetti della Giurisprudenza*, p. 39.

conceptions. But on the other hand if they are really possessed of those rare endowments which in all extended and liberal professions some individuals will almost invariably be found to enjoy, they seem better calculated to compose a court of Equity than any other number. In this country besides, the single equity judges have peculiar facilities for obtaining the opinion of the Common Law judges on points of unusual difficulty, either publicly or by private communication. This supplies them with ample extraneous assistance, while they probably discharge the ordinary duty of the court more satisfactorily and expeditiously than if each of them were aided by the counsels of two or three colleagues of attainments equal to his own. It should never be forgotten, that there is a marked difference between the nature of the causes which are brought into courts of Common Law and those which are brought into Equity. At Common Law there is frequently but one point to be decided, never many, and the judges are seldom required to do more than to declare what the law upon one or more of these points is.—Where that is the case, both the questions which arise, and the discussions which take place upon them are as unembarrassed as they can possibly be; and it is exactly on such occasions that a plurality of judges is attended with the greatest good and least inconvenience. But the causes which are most common in Equity are not of this nature. In most of them the parties and points in dispute are numerous, and the rights which

have to be settled spring out of a multitude of deeds and transactions which are always complicated and generally inconsistent. Both in arranging the final decree, therefore, and in settling the intermediate orders and references which the substantial justice of the case requires, great latitude must necessarily be left to the judge; much interlocutory conversation takes place between him and the counsel; and as two people seldom agree respecting the course of inquiry or discussion it would be most expedient in such case to pursue, the learning and discretion of one judge is more likely than the conflicting counsels of several, to conduct the business at the least expense of time and money to that termination which is most reasonable and consistent in itself, and most satisfactory to all parties who are interested in the issue.

2. The times at which the courts in Chancery sit and the length of their sittings.—The Chancellor and Vice-Chancellor both sit in Westminster Hall, as well as the Common Law judges, during the whole of the four law-terms, from ten in the morning till two, three, or four o'clock, according to the press of business which may be before them. The various official duties which the Chancellor has to perform, sometimes oblige him to rise considerably earlier than the Vice-Chancellor. Before and after each of the law-terms, both of these judges sit in Lincoln's Inn nearly twice as many days as they sit in Westminster Hall during their continuance, and their sittings are then also ra-

ther longer. As they go no circuits they probably sit in court near 200 days every year, and five hours may be near the average length of each sitting.

These public sittings however are not the only occasions on which the Chancellor and Master of the Rolls are empowered to act in their judicial character. "The Chancery," it has been observed, "is always open as to issuing of writs and equitable proceedings; and wherever the Chancellor or Master of the Rolls is, acts of court may be done by either of them."* It is afterwards added in the same book, "The Master of the Rolls doth all acts of judicial power when and wheresoever he in his discretion thinks fit as to the making of decrees,"† and instances are given of Sir John Trevor and Sir Harbottle Grimstone, when Masters of the Rolls, having ordered parties to attend them, the one at his house at Knightsbridge and the other at his seat at Gorhambury near St. Albans.† Whether the Vice-Chancellor possesses this power in conjunction with the Chancellor and Master of the Rolls may be doubted. He has never yet exercised it, and the Act of Parliament by which his office was created is silent on the subject; but the Chancellor and Master of the Rolls continue to use it to the present day, as often as any exigency arises which requires its exercise.

* Discourse of Judicial Authority of Master of the Rolls, p. 96.

† Ibid. p. 104.

As the judicial functions of the Master of the Rolls were originally confined to the dispatch of the less important part of the business which came before the Chancellor, he began and has since continued to sit in a hall in the Rolls House in Chancery Lane, and in order to suit the convenience of the bar, his sittings have either been held on different days from those of the Chancellor's and Vice-Chancellor's, or have begun after theirs have ended. During the four law terms he sits three or four nights a week from six o'clock at night till nine or ten, and sometimes considerably later. He sits also for a few days after each term during the time the Chancellor's and Vice-Chancellor's courts are closed, from ten o'clock in the forenoon till four, provided the business of the court should so long detain him. When the Chancellor and Vice-Chancellor resume their forenoon sittings after term his alternate evening sittings are resumed also, and continued with them. The whole sittings of the Master of the Rolls may nearly amount to a hundred and twenty in the course of a year, and their length may extend to four hours each on an average.

It is not easy to understand why the constitution of the Rolls Court should still remain the same, when the state of things to which it was originally adapted, has undergone an almost total alteration. This observation is made without the least desire either to impair its credit or undervalue its utility. It is not forgotten, that it was

in that place, at the late hours at which its sittings are still held, and in a confined crowded heated room, that such judges as Sir Joseph Jekyll, Sir John Strange, Lord Kenyon, Lord Alvanley, and Sir William Grant, enlarged and strengthened the foundations of Equity, and even in England shed additional lustre on the administration of justice. To the last-mentioned individual in particular, no adventitious honour which might have been conferred on his declining age, could have proved an adequate return for the distinguished service he has done his country. He has received a recompense better suited to the simplicity, dignity, and disinterestedness of his character, in the reverence which accompanies him wherever he is seen, and the burst of admiration which succeeds his name whenever it is mentioned. His total disregard of every art to captivate public favour or attention; his lofty but unpretending integrity and independence; the singularly collected and unprepossessed mind he brought to the examination of every subject; the silent and unremitting attention which he paid to every argument which was urged before him; the admirable medium he observed between dilatoriness and precipitation in the dispatch of business; and the clearness, strength, and comprehensiveness of reasoning by which his judgments were supported; all conspired to invest his judicial conduct and demeanour with that air of severe and commanding intelligence which none who have ever seen it, can either forget or hope to see again. But it was not because he and his predecessors sat

in such a place and at such an hour, that their names will be remembered, and their judgments held in honour. They could not have done less, and probably would have done more, if their sittings had been held at more regular and seasonable times, and in a place better fitted to the dignity of their station, and multiplicity and importance of the business that is brought before them. If it should be urged that as the two Houses of Parliament have long been accustomed to meet at night, there is no reason why a court of justice should not meet at night also, it may easily be replied, that the one circumstance affords no justification of the other. The Houses of Parliament sit in the evening not from choice but necessity, and the confusion and impatience which too often prevails at the conclusion of their deliberations, will not be contended to afford any recommendation of the practice. Besides this, the questions which are brought before courts of justice are generally of a more subtle and complicated nature than those which are agitated in legislative assemblies, and are most satisfactorily examined and determined when the state of the mind and body is most composed and vigorous. There can be no doubt that this usually happens during the earlier portions of the day, and it is that season accordingly which in all ages and countries has by the common consent of mankind been selected for the dispensation of justice. The appearance of the evening sun in the horizon was in early times regarded as the latest hour at which

a judge should be permitted to remain upon the judgment seat. 'Ο ἥλιος ἐπὶ των ὁρων ἡ ἐσχατὴ ὥρα ἐστὼ,* is the beautiful and simple language in which the Athenian law on this subject is expressed; and so fully were the Romans afterwards convinced of its expedience, that it forms one of the chief general ordinances promulgated in the 12 Tables respecting the administration of justice. “Ante
 “meridiem causam conscito, cum perorant ambo
 “præsentes. Post meridiem præsentem litem ad-
 “dicito. Si ambo præsentes, sol occasus suprema
 “tempestas esto.”† If the sittings of the Rolls Court were now to be appointed for the first time, there probably is not a single individual to be found, who would recommend them to take place at the intervals of time and hours of the day at which they are now held. Why then should they not be altered? If the convenience of the public required them to be fixed in the evening at one time, why should they not be changed to the forenoon at another if the same convenience requires it? If the causes which are entered for hearing before an efficient Master of the Rolls are twice as numerous and weighty as they were fifty years ago, and if the demands upon the other judges in Chancery are twice as great as they were at the same period, it is difficult to conceive why the Master of the Rolls should not sit in the forenoon on the same days and at the same hours as the Chancellor and Vice-Chancellor, and bear his fair proportion of the additional

* Petiti Leges Atticæ, lib. 4. tit. 4.

† Gothofredi Frag. 12 Tab. p. 68.

duty which the judges in Equity have had imposed upon them. No objection has ever been made to the adoption of this proposal, except that it would alter the situation and duties of a well known officer, and might prevent the practice of a portion of the bar from being quite so lucrative as it otherwise would. Neither of them is deserving of much consideration. It is undoubtedly true, that no officer either judicial or political, ought to have his character or duties altered unless it can be clearly shewn that the exigencies of the state require it. In this instance the existing exigency will not be denied; the projected change is liable to as little inconvenience and danger, as can ever attach to a measure of a similar nature; and to insist that the Master of the Rolls should sit only two days instead of three, and at six at night instead of ten in the morning, for no other reason than because he has hitherto been accustomed to do so, would evince a disregard of public opinion and perverse hostility to rational improvement which no person in the present day will be forward to exhibit. The effect which such a measure would have upon the bar is entitled to still less attention. If the interests of the country and the bar can be consulted at the same time, they ought in every case to be so. But the instant they become incompatible, there can be no room for hesitation which of them ought to yield. It is the duty of the bar to accommodate itself to the circumstances of the country, not that of the country to accommodate itself to the bar, and both the public and the bar will eventually sustain

equal injury in every instance where this principle is either counteracted or forgotten.

It is at the same time true, that if the Master of the Rolls were appointed to sit hereafter forty or fifty days longer every year than now, he ought to be released from his attendance on appeals before the Privy Council. This could hardly be regarded as a serious obstacle to any new modification of his own court. The part which he ought to take in the proceedings of the Privy Council as a court of justice has never been sufficiently defined. His presence there at all is entirely optional, and he himself hardly knows how much attendance he ought voluntarily to give, nor how much his Majesty's ministers have a right to expect. The continuance of such an arrangement does not seem to be on any account desirable. It would probably be more beneficial both for the country and its colonies, that the Privy Council should be supplied with one or more permanent judges for the dispatch of its exclusive business; and that the Master of the Rolls, as well as the other judges who have hitherto lent it their occasional gratuitous assistance, should each confine himself in future to the discharge of the duties which belong to his own court and office.

3. The actions, or suits as they are generally termed, that may be brought before each of the three tribunals now established in Chancery.—It has been already noticed, that except in matters which relate to lunatics, all of which are heard by the Chancellor himself, there are

few questions in Equity which may not be set down to be heard before the Chancellor, Master of the Rolls, or Vice-Chancellor, at the pleasure of the parties. When this has been done, however, the Chancellor may at his discretion desire the Vice-Chancellor to hear any matter which has been set down before himself for the express purpose of having it determined by himself in his own court. This regulation appears to be open to several strong objections. It is not likely to be satisfactory to the parties. In the constitution of courts of Law or Equity, the natural course seems to be, to take every possible precaution that parties should not have the power of entering a greater number or variety of causes before any one judge than he is likely to be able to dispatch. But if they are allowed and have actually exercised a choice, that circumstance alone, if there were no other, must almost of necessity make them more dissatisfied with the judge before whom they are obliged to go, than they would have been if they had gone before him voluntarily. When one judge has the power of desiring another to hear and determine, it is also attended with this other obvious disadvantage, that it diminishes the dignity and efficiency which the inferior court would otherwise enjoy. Nothing tends more to raise a court of justice in the eyes of the public and the suitors, than to make it completely independent of every other as long as it acts incorruptly and does not exceed the bounds of its own jurisdiction, and nothing more effectually degrades it than to subject it to the most distant species of authority

or controul. This holds true as an universal principle, and its truth becomes the more apparent, the higher the degree of the courts may be where this subordination is perceptible. The Vice-Chancellor is a judge upon whom far too high a rank and title has been conferred, to make it expedient for him to receive any intimation from the Chancellor when and what causes should be heard before him, and one of the greatest improvements which that office could receive, would be to make it as independent of the person holding the great seal, as the Master of the Rolls now is and has immemorially been.

4. The persons that practise in them.—Nothing occurs to be here noticed, which has not already been mentioned under this head when speaking of the courts of Common Law. King's Counsel and those who have patents of precedence have pre-audience there as they have every where else, but all barristers may practise in the three courts in Chancery who have been called to the bar, and all solicitors who have been regularly admitted.

5. Their inferior officers.—The only subordinate officers attached to the court of Chancery to whom it seems necessary to advert, are the *Masters, Six Clerks, Registers, Cursitors, and Commissioners in Bankruptcy.*

Masters in Chancery are of very high rank and dignity, and the Master of the Rolls still belongs to their number, though his connexion with them has for more than two centuries been merely nominal. In the treatise *Of the Masters of the Chancerie*, printed in Hargrave's Law Tracts,

which that gentleman presumes to be the fullest which had then been published on the subject, the author proves from unquestionable records, that they were among the officers of the Chancery who were “ antientlie kept together either in the “ king’s howse, or in some spetiall hostell appointed for them, where they had lodging and “ dyet allowed them.—Besides their lodging and “ dyet, they had also robes of the king in spetie, “ not allowance in money for them, and that by “ delivery of the Lord Chancellor.—It seemeth “ moreover that they had allowance for horse “ meate by this record of 12 Edw. III. *de feno li-
tera et avena pro hospitio cancellariæ providendis* : “ but it is plaien that they had allowance of bote-
“ hire, and that in the best manner.”* It appears from the same account, that their chief employment then consisted in composing and examining writs for the furtherance of justice; in the examination of witnesses in the country by commission; in receiving general powers of attorney; in assisting the Chancellor at sealing times; and in attending the Higher House of Parliament without writ as being a part of that court, where they had a seat with the Chancellor on the woolsack, and were called upon to inform the house in matters of law, as the Common Law judges are at present. From the time when this treatise was written down to the present time, they have been involved in a greater number of struggles and discussions both about their rights and the reasonableness of their emoluments than almost any other servants of

* Hargrave’s Law Tracts, pp. 315, 316.

the public. In neither of these respects do they appear to have been particularly successful. Their rank and consequence sustained a serious diminution in the time of Queen Elizabeth, in consequence of the following unhappy accident. “ Doctor “ Barkley, a Master of the Chancerie, in the 18th “ of the quene, sitting in the Parliament Howse, as “ the manner is, upon occasion of speche amongst “ the Lords, of certaine officers to have certaine “ priviledges, without askinge leave got up, and “ entred into a speche of desiringe, that the “ Masters of the Chancerie might alsoe be comprised in the sayed priviledge then one foote; “ which request came soe unseasonably, and was “ so inconsideratelie propounded by the said “ doctor, as the lords in generall tooke offence “ thereat; and amongst the rest, some of great “ authoritie sayed, that whilst the quene’s learned “ counsell were silent, it were great presumption “ in him, beinge one inferior to them to be soe “ busie. Soe as upon this the next day, the serjant, attornie, and sollicitor, tooke place above “ the Masters of the chauncerie there which before “ time had never bene donne; and ever sithence, “ not onelie they, but serjants at the lawe alsoe, “ doe it generallie at all publique meetings, upon “ this reason, that they tooke place before the “ attornie and sollicitor. The which point as “ against the attornie and sollicitor, which palpable every daie raseth higher then other, it is “ not perchance fitt to dispute; soe as touchinge “ serjants at lawe, to my understanding, there are “ many reasons, whie they should not have pre-

“cedence. But what congruities there is, that
“the Master of the Chauncerie, whose by the func-
“tion of his place sitteth one the bench covered
“*coram domino rege*, should out of that place come
“behind the serjeant of the coiffe, who in distinc-
“tion from other of the king’s serjeants was called
“serjeant counter, and by the function of his
“place standeth likewise uncovered not onely in
“the court of Chauncerie before the Lord Chan-
“cellor, but in other places alsoe when they
“come to debate matters for their clients; let this
“judge.” Since that time the House has neither
been pleased to restore their place nor speech;
and they are now employed by it for scarcely any
other purpose than to increase its state, and
carry messages to the House of Commons. Their
struggle with the serjeants-at-law about prece-
dence was renewed on occasion of the procession of
James I. from the Tower through the city of London
at the time of his accession. The description then
given of their functions by one of their own body is
as follows:—“A Master of the Chancery is the
“King’s Majesty’s immediate sworn servant, re-
“ceiving from him robes, or satisfaction for robes,
“twice a year, and antiently divers others allow-
“ances for his skill and learning, appointed to be
“an assessor or assistant to the chiefest temporal
“officer of the realm, the Lord Chancellor, sitting
“by him covered on the same bench in the Chan-
“cery, one of the highest courts of this realm,
“to deliver to him his opinion and advice in the
“judicial causes in the same court, and to help
“him in the speedy expediting of them, upon re-

“ ferences reporting the state of divers matters
“ concerning the suits there, and to take oaths,
“ recognizances, and acknowledgments of deeds,
“ and to do divers other judicial acts as well in
“ court as any where else within the realm, the
“ same to be recorded as done before the king
“ himself; and also to look that no fraud be done
“ to the king’s seal, and lawfully to counsel the
“ king in things that touch the king when he
“ shall be thereunto required, and to keep secret
“ the counsel which he knoweth touching the
“ king; and antiently to prove and compact all
“ manner of writs, patents, and whatsoever was
“ to pass the great seal.”*

The latest and best account of the present actual duties of a Master in Chancery is given in the first Report of the Commissioners appointed by Parliament, in 1809, to inquire into the duties and emoluments of officers of courts of justice, and is in the following words:—“ To examine into alleged impertinence or scandal in
“ any bill or answer, and into the sufficiency of
“ any answer or examination.—To settle interrogatories for the examination of parties.—To take
“ the accounts of executors, administrators, trustees and guardians, and others.—To inquire and
“ decide in claims of creditors, legatees, and
“ next of kin.—To appoint receivers of personal
“ estate, and rents of real estate, fix their salaries,
“ and examine their accounts; to inquire as to

* Legal Judicature in Chancery stated, p. 71.

“repairs to be done, felling of timber, and
“granting leases.—To sell estates, and approve
“of the investment of trust money in the purchase
“of estates, and for this purpose to inquire into
“their value, to investigate the title to them, and
“settle the conveyance.—To inquire for the heirs
“and next of kin of persons dying intestate.—To
“appoint guardians of the persons and estates
“of infants, and to allow proper sums for their
“maintenance and education; to appoint com-
“mittees of the persons and estates of lunatics,
“and to examine the accounts of such commit-
“tees.—To tax the costs of proceedings in any
“suit, or under the orders of the court; and also
“the bills of costs of solicitors delivered to their
“clients, and referred for taxation under 2 Geo.
“II. c. 23; and also the bills of costs of solicitors
“for business done in bankruptcy pursuant to
“5 G. II. cap. 30.—To inquire whether infants
“are trustees or mortgagees within 7 Anne c. 19.
“—To inquire under 39 G. III. c. 56. into the
“interested parties in money subject to be laid
“out in the purchase of land.

“In general, there is no question of law or
“equity, or disputed fact, which a Master may
“not have occasion to decide, or respecting
“which he may not be called upon to report his
“opinion to the court.” (p. 10.)

The last paragraph of this account of the duties of Masters in Chancery ought either not to have been introduced at all, or it ought in fairness to have been coupled with that explanation which such a statement rendered necessary. Though

what is there alleged be literally true, yet it is of that indefinite and sweeping nature, which in the minds of many Members of Parliament for whose information this report was printed, is calculated to produce an impression substantially erroneous. Every person who is conversant with the administration of justice knows, that there is scarcely any legal or equitable jurisdiction however humble, before which questions of the greatest difficulty may not be, and sometimes are, unexpectedly brought. It was very material therefore in stating the duties and labours of a Master in Chancery to have had an estimate of the number of really difficult questions in law and equity, which upon an average may arise before each Master in the course of a year, and the nature of those which are of most frequent occurrence. This observation is not intended to detract from the merit and respectability to which Masters in Chancery are justly entitled, but merely as an illustration of the studious and systematic manner in which they and their friends have represented the duties of the office as more arduous than they really are, and requiring greater legal attainments than the majority of those who have filled them, have ever been supposed to possess.

Masters in Chancery have not been more vigilant in support of their rank, than in defence of their emoluments. As early as the reign of Richard II. a complaint was made against them, “ that they were over fatt both in bodie and
“ purse, and over well furred in their benefices,
“ and put the keinge to very great cost more

“ then needed.” Whether any redress was obtained in consequence of this remonstrance or not, the grievance was again felt and noticed not long afterwards. The author of the treatise on the *Masters in the Chancery** laments indeed that “ from this envie into what a state of pittie they “ are nowe fallen appereth but even overmuch,” yet it is stated by Norburie, in the beginning of the reign of James I. “ that nothing was more complained of, or more troublesome to the house, “ than the fees at that time taken by the Masters “ of the Chancery, which though the said Masters “ did not exact of the clients as a duty, but took “ what they freely and voluntarily gave them, “ yet it was held a grievance to the common- “ wealth not to be endured, and thereupon an act “ (1 J. 1.) was made, that no man to whom any “ cause was referred out of any of his Majesty’s “ courts of justice, should under a great penalty “ take any thing for his certificate or report, directly or indirectly.”† In the 18th of Ja. I. the discussion about the court of Chancery and particularly about the claims and fees of the Masters was renewed, in consequence of the corrupt practices of Lord Chancellor Bacon. The result was, that various measures were begun for the reform and regulation of Chancery, after which a bill for adding two assistant judges to the court, and lessening the expense of its proceedings was

* Hargrave’s Law Tracts, p. 314.

† The Abuses and Remedies of Chancery, by Geo. Norburie. Printed in Hargrave’s Law Tracts, p. 428.

brought in and read a first time, but the parliament was dissolved before it received the sanction of the legislature. They have however not only retained possession of the emoluments then complained of, but by force of usage, have since acquired a right to others, which are felt at the present day to be both oppressive and unnecessary. The chief of these arise from the profit made by them on copies of proceedings furnished by them to the parties, and from the fees paid on taking out warrants for attendances before them. The abuse complained of with respect to these warrants does not consist in the amount of the fee paid on each, but in their unnecessary multiplication. Until the third or peremptory warrant the party served with it neither does nor is expected to appear; and as these three warrants only entitle the parties to an audience of the Master for a single hour, except those cases where he is directed to proceed *de die in diem*, so many hours are required for bringing an inquiry of any difficulty to a termination, that the delay and expense occasioned by these numberless warrants become heavy and vexatious. The copy-money is a source of revenue still more obnoxious. As the Master claims the right of furnishing parties with all copies of papers which are required, his clerk gets a law-stationer to furnish these copies at a certain rate per sheet, for which the suitor is charged three times as much by the Master, and the difference between the

* Com. Journal for 1620 and 1621, printed in 1766.

price paid and exacted, the Master and his clerk share in certain proportions between them. The consequence of this is, that the private emolument of the Masters and their clerks is obviously promoted by every increase which takes place both in the length and number of the copies of papers and proceedings which suitors are obliged to take; and though many Masters are known to prefer their duty to every other consideration, it is vain to expect that direct and material personal interest should there cease to have that effect which it is known to produce in every other instance. Several Masters have accordingly expressed a desire for the suppression of copy money and some other fees now exacted, and that some other remuneration should be provided in their stead. As yet however no specific measure for that purpose has been either sanctioned or proposed by any public authority. Indeed so little tendency has been hitherto manifested in practice, to diminish the fees exacted in the Masters' offices, that some of them were actually increased, by the general orders issued by Lord Erskine on the 26th of February, 1807.*—This power of increasing the fees of inferior officers of justice, without having received the sanction of the legislature, though denied by Lord Coke in the most express terms to be legal,† has been invariably exercised by almost every court of justice in the kingdom.

* Beames's Orders, p. 465.

† Second Institute, vol. v. p. 533. *De Tallagio non concedendo*.

When certain dues were lately claimed by the officers of one of the Common Law courts in Westminster Hall, without being able to bring forward either an act of parliament or immemorial usage in their support, so little confidence was felt in the validity of the right on which those and perhaps other exactions of a similar nature depended, that the 3 Geo. IV. c. 69. was subsequently passed authorising the heads of the several courts to settle the fees of their subordinate officers as they may see occasion. Masters in Chancery may almost be said to have had the settlement of their own; for in the parliamentary commission appointed in 1815 to inquire into the fees of officers in courts of justice, it happened unaccountably enough that two out of the five commissioners named were themselves Masters in Chancery, and the report made by them in 1816 is in every respect so favourable to the Masters, that it might reasonably have been expected to be received by them with unanimous and cordial satisfaction. Four years however after the date of this report, a Master again presented himself as the vindicator of his order, expressing displeasure at any interference with their regulations and proceedings, justifying the reasonableness of their emoluments, and arrogating for them nearly the same rank and consequence which Dr. Barkley did two centuries ago.* Most probably the Masters

* Letter to the Right Hon. Sir J. Newport respecting the Commission to inquire into the Fees and Duties of Officers of Justice, by F. P. Stratford, Esq. one of the Masters in Chancery. 8vo. 1820.

have derived little advantage from his aid on this occasion. To testify constant and extreme jealousy with respect to matters of right or reputation is one of the surest methods of creating suspicion with respect to both, and Masters cannot be classed among the public officers who ought to complain of having been underpaid or undervalued. Each of them receives at present £700 a year of salary; the copy money of some of the offices is said to amount to 6 or £800 a year more; and the sums derived from these sources, together with their other fees, are said to swell the average income of each of the 10 Masters in ordinary, exclusive of the Accountant-General who is one of them, to nearly £3000 a year, which is usually conceived to be an ample remuneration for the services they are required to render. By an unprinted act of 13 Charles II: one of the Masters is appointed to attend in the public office on certain specified days from seven o'clock in the morning till twelve at noon, and from two in the afternoon till six.* Now however, the Master in attendance is present only from ten till two, and from six till eight.† In the Masters' private offices attendance is given, except during the four vacations, from ten in the morning till three in the afternoon, and from six to eight in the evening;‡ but I am not aware that an account is any where given of the precise number of days in each year, and average number of hours

* Harrison's Practice, p. 16.

† Turner's Practice, p. 7.

‡ First Report of the Fee Commissioners, p. 11.

each day, during which the Master actually attends in person. It is but justice to the Masters to acknowledge, that many of them are possessed of great legal acquirements and application; while there have been others among them to whom their appointment has been a welcome provision against the instability of fortune and advances of old age. Indeed it is well known that the office is uniformly regarded, taking the duty and salary into consideration, as one of the most desirable which the profession of the law affords. Instead of maintaining an unceasing contest about their fees and eminence, it would be more expedient for the Masters to suggest such improvements as might be made in the manner of conducting business before them, and to remove all causes of complaint which spring from the non-observance of express salutary and unrepealed orders of the court to which they belong.* “I would wish,” said a Master, who has evinced no ordinary solicitude for the honour of his brethren, “this
“course to be holden, that we sought at first
“rather to renewe the performinge of our duties
“withowte gaine, than over-eager be to pursue
“our gaine at the first; and I think God would
“blesse our proceedings the better. If thes
“thinges were thusse once begoune, then might
“we treat and endeavor the restoringe of our
“auntient rightes, or recompence for them, with
“more credditt and reputation, with more com-
“moditie in consultation, and more readines of

* Beames's Orders, pp. 79 and 81.

“ contribution; without which thes things I doubt
“ will not be effected.”*

The *Six Clerks* are the next class of officers enumerated, and they are to this day the only attornies for conducting equitable suits which the court of Chancery has recognized. By an order still subsisting, their duty is described to be “to
“ inform themselves continually of the state and
“ proceeding of their clients’ cause, whereby they
“ may be able to defend their clients, and to give
“ an account to the court as the attornies in all
“ other courts do, and not to leave the care and
“ knowledge thereof upon their under clerks.”†
They receive and file all bills, answers, replications, and other records, in all causes in Equity in Chancery; sign all office-copies in order to be read in court, as well as certificates; and attend upon the court by two at a time at Westminster in term time, in order to read the pleadings as often as that service may be necessary. The routine business of the public office of the Six Clerks in Chancery-lane is done by their sworn under-clerks, of whom each has usually ten, besides two waiting clerks; all of whom are accountable to their proper six-clerk for the business they transact. Each six clerk, when absent himself, employs a sworn or waiting clerk of his own division to file the proceedings, and to sign office copies and certificates.‡ From the First Report of

* Hargrave’s Law Tracts, p. 319.

† Beames’s Orders in Chancery, p. 74.

‡ Harrison’s Chancery Practice, p. 19.

the Fee Commissioners, it might be inferred, that the Six Clerks themselves also sign all copies of pleadings made by their sworn and waiting clerks, but this seems to be a mistake which has crept in through inadvertence.* The six clerks have also the care of all records in their office, to which the sworn and waiting clerks have access for six terms without any fee. These records are afterwards sorted and laid up in the record room in bundles, to which indexes or calendars are annexed for their more ready inspection.†

What special or really efficient duties the six clerks personally perform does not appear to be any where distinctly specified. It is said to be expected that each should attend in the six clerks' office in London six months in the year by two months at a time, unless they make a private arrangement with some of their coadjutors, but the other six months they are at liberty to spend where they please. The signature which the six clerk or his deputy affixes to an office copy, and from which a considerable part of the profits of his post are derived, leaves him totally irresponsible for any slip or error the copying clerk or law stationer may have committed. This point was determined by the Master of the Rolls in 1820 or 1821, upon a petition which a solicitor brought against a six clerk for reimbursement of the expenses occasioned by proceedings into which a solicitor alleged he had been led by the omission

* First Report of the Fee Com. p. 45.

† Id. ib.

of a material word in an office copy. It might perhaps have involved the six clerks in too heavy a responsibility to have decided otherwise, but it is obvious that this judgment almost wholly destroys that confidence in the exactness of the copy which their name had previously been supposed to guarantee.

The office of *Register* of the court of Chancery is executed by four Registers, each of whom is entitled to have two articulated clerks. In former times they had only the title of Deputy Registers; but the office of Principal Register, which was held by patent under the crown, has lately been abolished. The Registers sit in turn before the Chancellor, Master of the Rolls, and Vice Chancellor, and take notes of all orders and decrees pronounced, from which they draw up the orders and decrees which are afterwards entered in the general register kept for that purpose in the Registers' office. They also make and sign copies of decrees, dismissions, and orders, for parties who may require them; mark exhibits proved *viva voce* in court; sign certificates of various kinds; and perform some other duties of a more special nature.* The emoluments of the Registers arise from the fees which are paid in setting down causes, on furnishing the parties either with minutes or copies of orders or decrees, which they do at so much a sheet, and from a provision of £550 a year which was made for

* Harrison's Practice, p. 21. First Report of Fee Com. p. 31.

each of the two senior Registers by 49 G. III. c. 69. What may be the amount of the annual income of each of the senior and junior Registers has not been ascertained. The Registers may choose whom they please for their articulated clerks, and upon the death or resignation of any of their number, the senior articulated clerk succeeds, as a matter of course, without being required to submit to any prescribed course of study or examination.

Commissioners in Bankruptcy may also without impropriety be regarded as subordinate officers of the court of Chancery. Their places and duties are strictly speaking altogether of a statutory nature; but as they are nominated by the chief equitable judge, and as the most part of the business which comes before them depends more upon the rules of equity than of common law, they are in reality more closely connected with Chancery than some other officers who have always been ranked among the members of the court. These Commissioners are 70 in number, besides 4 *tam quam* commissioners, each of which 74 has, for 15 or 20 years past, derived an income of nearly £300 a year from his office. The 70 Commissioners are divided into fourteen lists, each list acting independently of the others, and the whole 74, who have for many years been either barristers or solicitors, are appointed at the sole will and pleasure of the Chancellor. It is singular that the superabundance of judges in bankruptcy should have been so remarkably contrasted with their scarcity in every other department of the

law. Such a host of ministers of justice would excite no small surprise if a bill for their creation were now laid before the legislature for the first time, and it is not easy to comprehend how they have continued for such a length of time without some attempt being made to substitute another jurisdiction better suited to the improvement in commercial law and actual circumstances of society. No species of incapacity or misconduct is attributed to the Commissioners, who must be acknowledged to have displayed greater diligence and ability than could have reasonably been expected. But there are objections to the system itself which appear to be absolutely insurmountable. Some of these flow from the nature of the commissionerships themselves. They are of that precise value which makes them an object of desire to many who would neither strive for less or look for more ; their duties do not require constant or undivided attention ; and as they may be tolerably performed without much study by any individual possessed of ordinary understanding, they constitute a richer and more uncontrouled species of patronage than it is fit for any one servant of the Crown to have at his disposal. The Chancellor lies under no such check in making nominations to them as to the higher posts in the law, and persons are sometimes selected to fill them who would not be trusted in a more responsible situation. Another objection to these Commissioners arises from the incompatibility which usually exists between the duties of their public

and private station. Without sitting long enough at any one time in a judicial capacity to forget that they are Counsellors and Solicitors, or possessing sufficient rank to enable them to exert the authority of Judges: deciding a point at Guildhall as Commissioners to-day, and perhaps holding a brief in the same bankruptcy in the court of Chancery as Barristers a few days afterwards: the opposite characters they have to support must necessarily create a degree of confusion both in their own minds and those of others, injurious to the consistency and gravity which judges ought to maintain, as well as to that respect for their office which the public ought to yield. Besides this, they form beyond all contradiction the most expensive part of the whole judicial establishment of England. The mere statement that 74 judges sit in bankruptcy alone at an expense of about £23,000 a year, while 3 perform the chief part of the business in equity for about £20,000, and the 12 judges who dispatch the whole common-law business of the country cost little more than £50,000, is sufficient to supersede all argument on the subject. Were two or three courts, composed of three judges each, at a salary from £1,500 to £2,000 a year, with liberty for one judge sitting alone to dispatch the less important business, and a power vested in the whole court of desiring cases on particular points to be laid before the common law or equity judges for their opinion, the bankrupt questions arising in London would perhaps be settled more

satisfactorily than they are at present: the cost of petitions to the court of Chancery would be in a great measure saved; as well as the costs of Commissioners in the country, whom it is difficult to prevent, whether they act ill or well, from eating and drinking at the charge of the estate of the bankrupt, in defiance of the prohibitions of the statute.

Whatever difference of opinion may prevail with respect to the form or authority which it might be proper to give to a separate court of bankruptcy, there can be no doubt that a very prevalent desire exists for its establishment. A considerable number of those whose judgment is entitled to the greatest consideration, seem to conceive such a measure to be essentially necessary to give full effect to the provisions contained in the act lately passed for the consolidation and amendment of the bankrupt law.* In what degree such a tribunal should be without appeal to the court of Chancery may give rise to considerable difference of opinion. This reasoning does not coincide with the opinion delivered by the House of Lords. The Committee has expressed itself to the following effect:—"It has been represented to the Committee, that the relief afforded to the Chancellor by this arrangement has been very considerable, a great proportion of the petitions in bankruptcy having been heard and decided by the Vice-Chancellor in late

* Eden's Observations on the Bill depending in Parliament, in 1824, for the Consolidation and Amendment of the Bankrupt Laws, p. 21.

“ years; and that though, upon the first institution
“ of that office, it was not unlikely there should be
“ many appeals, the number of petitions finally
“ decided by the Vice-Chancellor has been very
“ considerable, and it seems probable that the
“ number of appeals will decrease.”—“ It does
“ not therefore appear to the Committee to be de-
“ sirable or necessary to withdraw the jurisdic-
“ tion in bankruptcy altogether from the Lord
“ Chancellor, due attention being given to check
“ frivolous and vexatious appeals. It has how-
“ ever been represented as worthy of consideration,
“ whether the practice, which was formerly in use,
“ of referring to two judges (under acts of parlia-
“ ment then in force) the hearing of petitions
“ for bankrupts’ certificates might not be usefully
“ revived.”* This judgement of the Committee
ought no doubt to be received with all the respect
which is due to the experience and capacity of the
noble persons by whom the report has been pre-
pared and sanctioned. At the same time it ought
not to be forgotten, that the Chancellor’s senti-
ments can hardly fail to be swayed by the large
emoluments which he now derives from proceed-
ings in bankruptcy. On all legal subjects his senti-
ments have usually great influence in the upper
house of parliament. If the fees which the Chan-
cellor now receives from bankruptcy should either
be reserved, or an adequate compensation provided
in case of their abolition, it might perhaps be

* Reports of Lords Committee on the Appellate Jurisdiction,
p. 9.

found that the chief obstacles to the institution of a separate court of bankruptcy would imperceptibly die away. That equitable questions of great difficulty sometimes occur in bankruptcy is no doubt true. Difficult questions of strict law do so likewise. Though the difficulties which arise most frequently are of an equitable nature, that circumstance only shews that the persons best qualified to preside in a court of bankruptcy, are those to whom the doctrines and practice of courts of equity are familiar. Whether there should be any or what appeal from a court of bankruptcy to any of the divisions of the court of Chancery, is a matter which might be left open to examination and inquiry, and ought naturally to depend on the rank and qualifications of the judges of the new tribunal.

The *Cursitors* are the last class of subordinate chancery officers whom it remains to mention, though they have no immediate concern with the administration of justice in that court. They are twenty-four in number, and were incorporated by Queen Elizabeth under the title of the Four-and-twenty Cursitors, among whom the business which arises in certain shires and parts of the country was at that period arbitrarily and unequally divided. They make out all writs which receive the name of *originals*, issuing out of Chancery and returnable in the Courts of King's Bench and Common Pleas, as well as all writs of entry and covenant; and their duty formerly was to insert

new forms of writs as there might be occasion.* They used formerly to dine together during the four legal terms, for the purpose of improving each other by a communication of each other's thoughts and experience,† and the eighth and most important article laid down for the government of the corporation runs in the following words: “Item, “no cursitor shall occupy his office by deputy, “but shall attend from the beginning of the term “to the latter end of every term, except it be “by occasion of sickness, or by licence of the “Lord Chancellor or Keeper of the Great Seal “for the time being.”‡ Most probably all those parts of their antient regulations which relate to the exaction of fees remain to this day in vigorous observance, while this article, which is so material for the public service, has long been totally neglected. The whole of the four-and-twenty cursitors now act by deputy, and though each of their places is worth from £200 to £1200 a year, they are in fact mere sinecures, and appear to be among the most useless places which the Chancellor now has at his disposal.

It is impossible for any unprejudiced person to survey the present state of the Court of Chancery and not be struck with the multitude of sinecures with which in the progress of time it has come to be overloaded. The greater part of the officers who now occupy places in Chancery are no doubt

* Curs. Can. p. 25. First Rep. of Fee Commissioners, p. 81.

† MS. in the possession of Henry Maddock, Esq. of Lincoln's Inn.

‡ Ib.

absolutely necessary under some character or denomination for carrying on the business of the court, but it is undeniable that a considerable proportion of them are either almost or entirely inefficient, and that lucrative sinecures abound more in the Court of Chancery than in any other department of the government. The annual value of the whole places belonging to the various courts of equity, including those of the Chancellor, Master of the Rolls, Vice Chancellor, 10 Masters in Chancery, Accountant General, 6 Six Clerks, 60 Clerks in Court, 4 Registers, 24 Cursitors, 74 Commissioners in Bankruptcy, and Commissioners Extraordinary in the Country, with all the train of sinecurists, deputies, clerks, and assistants, it is impossible to calculate. It probably amounts to between £200,000 and £300,000 a year. That the greatest part of this sum is not ostensibly paid out of the treasury in salaries, but exacted from the suitors in the shape of fees and dues, can make no possible difference in the weight of the burden, nor ought it to make it more reconcilable to the country, that so large a share of it falls to the lot of those who perform no service whatever to deserve it. It would be tedious and invidious in this place to give a detailed account of these sinecures, or the names of those who fill them; but one example which is furnished by a public document may be given as a specimen of the extent to which this species of patronage may be carried. It appears from a return made to the

House of Commons in 1822,* that a near relation of the Chancellor has received from him a grant of the six following offices: 1. Register of Affidavits in the Court of Chancery,—2. Clerk of the Letters Patent to the Court of Chancery,—3. Receiver of Fines in the Court of Chancery,—4. One of the Cursitors for London and Middlesex,—5. The Clerkship of the Crown in Chancery in reversion,—and 6. The Grant of the Office for the Execution of the Laws and Statutes concerning Bankrupts in reversion likewise. All of these offices are for life, and all of them executed by deputy. Their annual value is set down in the report at the several sums of £1260 : 14 : 10.—£451 : 5 : 5.—£581 : 2.—£500.—£1081.—and £4554., and some of them are believed to be rated much below their present real value. Of the four first he is now in actual possession, receiving from them probably not much less than £3500. a year; and if he should survive the occupant of the other two, the reversion of them may swell his income to about £9000. a year. It certainly is true that the Chancellor has in strictness a right to bestow these places upon whom he pleases, but the gentleman alluded to has never done, or been required to do, any service to the law; and whether Lord Eldon holds beneficial appointments himself, or confers them on his immediate connexions, a certain degree of moderation ought never to be disregarded. “Gardez vous,” said the Chancellor

* Ordered to be printed 9th July, 1822, p. 12.

de l'Hôpital to the French judges, "surtout de la
 "convoitise d'un vil gain. La marchandise est
 "chère lorsqu'on l'achète avec perte de los et de
 "gloire. J'aime mieux la pauvreté du Président
 "de la Vacquerie que la richesse du Chancelier à
 "qui son maître fut contraint de dire, C'est trop,
 "Rolin."* It cannot be denied that it is too much
 in this very instance, and the facts which have
 been stated, strongly point out the inexpedi-
 ence of continuing sinecures, of which the disposal is
 so little directed by the merit of the individuals
 upon whom they are usually conferred. It might
 have been supposed that they would have formed
 one of the subjects of inquiry to which the
 attention of the Commissioners appointed by
 parliament, in 1815, to investigate the fees of
 officers of courts of law would have been pri-
 marily directed. Part of their duty is by the
 very terms of their appointment described to
 be, "to make a diligent examination of the duties,
 "salaries, and emoluments of the several officers,
 "clerks, and ministers of justice of and within the
 "Court of Chancery, and other courts in the said
 "Commission particularly mentioned and referred
 "to, and also to make a diligent examination what
 "regulations may be fit to be established respecting
 "the duties, salaries, and emoluments of the said se-
 "veral officers, clerks, and ministers of justice."†
 No part whatever of the arduous duty implied

* Vie du Chancelier de l'Hôpital, p. 310.

† Commission prefixed to First Report of the Commissioners of
 Fees in Courts of Justice, p. 1.

in these words has adequately been discharged. However respectable the persons who sat upon the Commission may individually be, it is impossible to glance over the few first pages of their first report, which is by far the most important they have yet returned to parliament, without perceiving even at the outset, a greater disposition to justify or palliate every existing practice and institution than they ought to have entertained, or to rise from the perusal of the whole* without being satisfied, that they have done less to deserve the extravagant expence they have cost,† than any parliamentary commission which has sat in the course of the present century in England.

SECTION III.

On the Constitution of the House of Lords as the Court of Ultimate Appeal from Courts of Common Law and Equity.

IN all equitable suits where a judgment has been pronounced in the Court of Chancery, or on the equity side of the Court of Exchequer, the House of Lords is the only tribunal before which an appeal can be brought. From a decision of

* Commission prefixed to First Report of the Commissioners of Fees in Courts of Justice, *passim*, particularly pages 82 and 183.

† Letter to Sir John Newport on the Commission to inquire into the Courts of Justice in England, by P. Stratford, Esq. one of the Masters in Chancery, p. 5.

each of the three supreme Courts of Common Law, an appellant may if he pleases always carry it directly to the House of Lords ; but in certain cases he has it also in his power to carry it before an intermediate judicature, if he should deem such a course more expedient. By the 31 of Edward III. c. 12. a Court of Exchequer Chamber was appointed, consisting of the Lord Chancellor, Treasurer, and Judges, for the review of judgments delivered in Exchequer. Another court of Exchequer Chamber was appointed by the 27th of Elizabeth, c. 8. consisting of the Judges of the two courts of Common Pleas and Exchequer, for the purpose of hearing appeals from the King's Bench, in cases where the action has not commenced in that court by *original*. There is likewise an appeal from the decision of the court of Common Pleas to the court of King's Bench in all instances. Besides these various appeals which may be made either from one court of Common Law to another, or from them to the courts of Exchequer Chamber, each of the three great Common Law courts is empowered, whenever any case of peculiar difficulty occurs before it, to call in the assistance of the members of the two other Common Law courts, that the matter may be solemnly argued and determined in the Exchequer Chamber before the whole twelve Judges of England. It does not appear how or when this right was conferred upon them,* but they have probably possessed it ever

* Coke's 4th Institute, p. 119.—Petyt's Jus Parliament. p. 26.

since the separation of the *Aula Regis* into different jurisdictions. Whatever may have been the manner in which it was acquired, it is so rational a privilege to concede to the judges and so beneficial to the suitors, that no further recommendation than its own intrinsic merit is required to insure its continuance. It is not likely to be enforced too frequently, nor does it interpose delay, increase expense, or multiply proceedings. It is calculated to answer all the ends of the whole intermediate courts of appeal which have just been mentioned, without being liable to the strong objections which may be urged against them. To preclude an appeal from the King's Bench to the Exchequer Chamber merely because the action has commenced by original writ instead of bill of Middlesex, and to permit this appeal in all other instances—to authorise appeals from the Common Pleas, where the most difficult questions of law are supposed to be brought and the most experienced lawyers are presumed to practise, in order that they may be revised in King's Bench where the qualifications of both judges and practitioners ought in all reason and consistency to be less distinguished—and last of all to allow an appeal to the Exchequer Chamber from the judges of the Exchequer when they sit as expounders of law, and to refuse it from the decrees of the same men when they sit as expounders of Equity—appear to be anomalies by which the judicial system of England is rather disfigured than improved. As these intermediate appeals

are seldom resorted to in practice, and that scarcely ever but for the purpose of delay or oppression, the whole of the appellate jurisdiction of the King's Bench and the Exchequer Chamber might be safely superseded.

The House of Lords would then constitute the sole, as it is now the usual, court of immediate appeal from each of the supreme courts of Common Law and Equity. This assembly consists of all English Peers, and Peers of the United Kingdom, of the sixteen representative Peers for Scotland, and four spiritual and twenty-eight temporal representative Peers for Ireland. It acts in two separate capacities; as one of the two deliberative bodies of which Parliament consists; and as the supreme court of appeal in all civil suits except those which arise in the Colonies. It is only in the second of these points of view that it comes here under consideration. About a hundred and sixty years ago the House of Lords arrogated the right of entertaining suits as a court of original jurisdiction as well as court of appeal, and a memorable struggle ensued between it on the one side, and the House of Commons and court of King's Bench on the other, by both of whom this pretension was strenuously resisted.* The claim to original jurisdiction the House itself at last wisely abandoned, and it has since contented itself with the enjoyment of the appellate jurisdiction alone,

* Hale's Jurisdiction of the House of Lords, p. 107. Hargrave's Introduction to Hale's Jurisdiction, p. 103 et seq.

of which it remains in undisturbed possession. The Lord Chancellor, who acts as its perpetual Prolocutor by virtue of his office, presides at the hearing of appeals as well as upon every other occasion when he happens to be present, but all members of the House who have attained the age of twenty-one have an undoubted right, except in one or two disputed cases, to sit, speak and vote on every question which may come before them. Great deference is, at the same time, always paid to the opinion of those Peers who have been bred to the profession of the law, among whom two or three Chief Justices or Ex-Chancellors are usually to be found, and especially to that of the Chancellor for the time being, whose official rank, capacity, experience, and the attention he is indispensably obliged to bestow on the business under consideration, necessarily confer upon him a predominating influence in the determinations of the House.

Until a recent period, comparatively few legal questions were brought before this court of ultimate resort, except claims of Peerage and rights connected with them, and those which happened to occur were usually heard by the Chancellor, either on those days when the court of Chancery did not sit, or when he could procure the Master of the Rolls or some of the other Judges to carry on its sittings in his stead. Towards the close of the last or beginning of the present century however, the number of appeals, of which a considerable proportion came from Ireland, and a much larger

from Scotland, began rapidly to increase, and in 1813 the accumulation of them became so great, that the House felt itself under the necessity of sitting three days a week from 10 till 4 during the session, for the sole purpose of disposing of appeals and writs of error. This course of proceeding continued till 1823, when it was announced by a Report of the House on the Appellate Jurisdiction, that notwithstanding the additional means of dispatch which had been thus employed, the number of remaining appeals and writs of error, instead of being diminished, had gone on regularly and rapidly augmenting, and that there then remained to be heard and determined 3 from Wales, 27 from England, 44 from Ireland, and no fewer than 151 from Scotland.* Alarmed at this prospect of their own condition, and sensible that the established legal machinery of the House had from some defect in its power or rate of working become incapable to reduce the causes which seemed bursting in upon them, they mechanically proceeded to set up two Judges instead of one, and furnished a forced supply of Peers to keep them both in motion. Accordingly in the beginning of 1824 an entirely new officer was created under the name of Deputy Speaker, for the purpose of hearing appeals during two days a week in addition to the Chancellor's three; and a standing order was made to compel the appearance of as many members in rotation as should be sufficient

* Report on the Appellate Jurisdiction of the House of Lords, Appendix B. p. 20.

to fill up each day the limited contingent of three peers and a bishop, which is the regular number now required to constitute a house. Judging from the result of this experiment, during the six months which this system has been in operation, it seems to be generally thought that it has been completely successful. It promises temporary relief, and as it was only proposed to be of temporary duration, it is possible it may act with so much vigour as to fulfil its purpose and come to its intended termination without any inconvenience being suffered from its introduction. It is not impossible on the other hand, that the creation of a new officer to exercise a concurrent jurisdiction with the Chancellor in the disposal of appeals, as well as the method which has recently been adopted for obtaining the compulsory attendance of peers, may turn out to be innovations of a more hazardous nature than they have been imagined. That every Peer should be duly qualified to vote upon all legal or deliberative questions which may come before the House on those occasions when he happens from choice or necessity to be present, is neither supposed in theory nor is it possible in practice. In questions of a political or legislative nature, the deficiencies of the House, even where they exist, are not obvious to common observation; and with regard to those which are strictly legal, they were, until within the last twenty or thirty years, comparatively so rare, that the magnitude of the property at stake, the rank and notoriety of the parties, the interest belong-

ing to the point at issue, the habitual reverence formerly paid to place and dignity, and more than all, the state and ceremony with which business was conducted, conspired to prevent its qualifications as a Court of Justice from being subjected to close examination. With time and familiarity all this is wearing fast away, and the multitude of appeals alone is helping more than any other cause to destroy the awe with which the discussion of them was wont to be attended. As they occupy the time of the House so constantly during the session, that the requisite number of peers do not spontaneously attend, a reinforcement of them is daily brought up for the ostensible purpose of bearing a part in the investigation of questions of which they are so profoundly ignorant, that it is painful to observe the expedients to which they have recourse to conceal or relieve the dulness of their situation. But this is not all. As the service of these distinguished conscripts does not last beyond a single day, it seldom happens that the same person hears out both sides of the same argument, and if a cause should prove long or intricate, it may be begun before an unlearned, inexperienced youth of three or four and twenty, continued before a general of horse, and ended before a yellow admiral. It is true all this is done in conformity with the rules and usages of the House, but this cannot long be received as a valid excuse for a proceeding so intrinsically absurd. Few improvements in our constitution are more to be desired than that a certain proportion of Peers,

should addict themselves more to the study of the law, and that the study of the law should be to them made more easy and interesting. If some of them who have not applied much of their time to subjects of legal or constitutional research, should occasionally step in while an adequate supply of efficient members regularly attended to transact the business, no just animadversion could be made on the adequacy of the tribunal to which they belong; but gravely to persist from day to day in the repetition of a piece of solemn mockery, while the rights, characters, and property of their fellow-subjects are at stake, cannot fail eventually to become displeasing in the eyes of the country, and discreditable to the administration of justice.

The appointment of a Deputy Speaker to determine appeals in the absence of the Chancellor, seems calculated to detract from the character of the House at least as much as the compulsory attendance of peers to witness their discussion. In the first place he is an unknown public officer, and place and consequence, as well as present or expected remuneration corresponding to his rank, must be bestowed upon him. This has not yet been done, and the House may find considerable difficulty in providing it. Most probably they apprehend that his occupation will have ceased before they are likely to be called upon to take these subjects into consideration. Nothing can be more improvident than to act upon such vague expectations. It is well known that no kind of dignitary can be set up in any department of the

state, without at once altering the relations of all who are above, beside, or below him, and the inconveniences arising from his creation invariably increase with the extent and arduousness of the functions with which he is intrusted. Every new office therefore, however short it may last, affords reasonable ground of alarm, both on its own account and as a precedent for others. But it is not certain that the duration of this functionary will be so limited. Years may imperceptibly steal away, the arrear of causes may remain undischarged, and the Deputy Speaker may linger on until the permanent establishment which he obtains, may be lamented by those very persons to whom his existence has been owing. The manner in which the Deputy Speaker is employed is not less open to animadversion than his creation. Causes are not heard by him and the Chancellor according to the order in which they stand in the roll; but an arrangement has been made by which the Deputy Speaker is confined to Scotch appeals alone, while the Chancellor disposes of all those which come from the other parts of the Kingdom. This appears to be an unnecessary and invidious distinction, with which it is almost impossible the people of Scotland can long continue satisfied. It is in itself a sort of degradation, and tends to promote causes of discontent, of which factious and designing men may avail themselves when it is least expected. The right of appeal which the people of Scotland by the act of Union reserved to the House of Lords, could

not have been understood to be an appeal in any respect differing from that which was competent to their English brethren; and to order their causes to be tried by the Chancellor's deputy, while all others are tried by the Chancellor himself, is a distinction which it is neither liberal nor politic to introduce now for the first time. That Scotch appeals have of late years occupied a disproportionate share of the Chancellor's attention is certainly true, but the litigious disposition of the people of that country is not the only cause which may be assigned for the growth of an evil so much to be lamented. Give them fewer or at least better judges than the majority of those they have for the last twenty or thirty years had; let appeals as far as regularity will allow be at once decided upon such grounds as the parties can advance, without remitting them upon technical objections to the courts below; and let the law of Scotland be administered without any concealed or avowed intention of assimilating its peculiar doctrines to those which prevail in that of England; and it is to be hoped this great source of appeals to the House of Lords will sustain a speedy and permanent diminution.

While this distribution of causes between the Chancellor and Deputy Speaker somewhat affects the people of Scotland, the disposal of these officers themselves may ultimately affect the dignity of the Chancellor and the House itself somewhat more deeply. That the judge who is highest in rank should be highest in place is a maxim

about which there can be no dispute, and to which there can be no exception. Yet according to the present arrangement the Chancellor abdicates the woolsack two or three days a week to hear motions and other ordinary business which may be brought before him as an original judge in Chancery, while the Deputy Speaker succeeds to all the pomp and splendour of the House of Lords, deciding on causes which are often of greater difficulty and value, and very generally of greater public interest and importance. Be this as it may, this arrangement is an obvious and unaccountable subversion of natural order and subordination. No speculator has ever ventured to propose a scheme so purely experimental, or so much at variance with the opinions and feelings of mankind. A single session will not pass over without producing a certain effect, and if it continues for a few years, it will divest the Chancellor of no inconsiderable portion of pre-eminence which has hitherto been immemorially connected with his name and office. Such seem to be the effects which this arrangement is likely to produce upon the Chancellor. Let them next be considered with respect to the Deputy Speaker. While the Chancellor is engaged in his own court, the Deputy Speaker is undergoing an ordeal in the House of Lords, the result of which, whether he acquits himself well or ill, cannot fail to be prejudicial either to the House or the Chancellor, but cannot possibly prove advantageous to either. If the Deputy Speaker should discharge his duty

with distinguished diligence and ability, the House has clearly not gained, because however eminent he may be, the relative station which he fills precludes all presumption of his attainments being superior to those of the Chancellor whose place he supplies. The Chancellor himself has clearly suffered, because instead of sitting alone and unrivalled as formerly, another eminent and independent judicial officer is raised up with whom he must be content to share the consideration of the House and homage of the public. Suppose, on the other hand, the Deputy Speaker should discharge his duty insufficiently, the consequence would probably be, that the Chancellor would be as much injured by the failure of his deputy as by his success, but whether he did or not, the House of Lords would infallibly be involved in the Deputy's misfortune. That body cannot fail to sink in reputation, whenever it permits any individual to be placed at its head who falls short in that judicial learning and wisdom which its constitutional functions require it to possess. Whichever of the contingencies now contemplated should happen, whether the creation of a Deputy Speaker should directly affect both the House and the Chancellor, or only affect the House indirectly by means of the degradation which it might entail upon him, the result would be equally unfortunate. On all occasions where the character of the House is concerned, its interest and that of the Chancellor will be found to be indissolubly linked together. Under no circumstances can they

be separated without mutual disadvantage. However great the inherent weight and dignity of the Chancellor may be, it is much augmented by the splendour of the place where he presides, while his presence reflects equal honour upon it by the universal respect and regard which is paid to his exalted and laborious office. With all the assistance that can be derived from rank, state, and talents, too much reverence cannot be preserved for courts of justice, and the present conjuncture is not one in which any judicial or deliberative assembly ought voluntarily to relinquish any just hold which it possesses over the minds of mankind. There is no probability that the House of Lords will be able to cease from hearing appeals of some sort or other during a great part of every session, unless they renounce the appellate jurisdiction altogether, and it seems fitting that the Chancellor should be always found as chief among them. Should one or more additional judges be required to expedite the ordinary business of the Court of Chancery, they ought assuredly to be provided, but the Chancellor's first apparent duty is to dispatch the appeals which are entered before the court of ultimate resort; his next to dispose of the business of his own peculiar jurisdiction, and of appeals in Chancery from the Master of the Rolls and Vice Chancellor, provided the continuance of such a proceeding should be thought expedient. If after that any spare time remained it might be well employed in forwarding equity business as an original judge in the manner he has hitherto been

accustomed to do. Both he and those who assist him in the work of doing justice, would thus be restored to their proper sphere, harmonising better together, and better disposed for the attainment of the ends which they were destined to accomplish.

The objections that have now been stated to the appointment of a Deputy Speaker, may have been expressed more strongly than future experience will be found to warrant. It will be a just subject of congratulation, if such should prove to be the issue, but whatever affects the influence or jurisdiction of the Chancellor is of such paramount importance to the state, that the most distant interference with his office cannot be too strongly deprecated. Perhaps no one public servant could be named whose influence and authority it is so desirable to continue unimpaired, and his practical utility in some respects exceeds that which is assigned to him by the theory of the constitution. The distinguished capacity and integrity, which the Chancellor has for two centuries almost invariably possessed, has on many trying occasions rendered him a protection to those who had no other person to support their interests: the habit of candid and deliberate examination to which he is trained by his professional life, naturally prepare him for pointing out the risk or irregularity of measures which may be proposed in the cabinet; while the fairness and impartiality which upon great legal and constitutional questions does and ought to direct his advice and de-

cisions whenever an appeal is made to his authority, renders him of incalculable value as an arbitrator between them and their political opponents. Too much skill and caution therefore cannot be manifested in examining the qualities and endowments of the individual by whom this judicial dictatorship is to be exercised; but when the choice has once been made, whatever is calculated to detract from that supremacy which almost puts it beyond his power to be guilty of an unworthy or illegal act, undermines one of the strongest bulwarks which wisdom and experience, aided by a favourable concurrence of circumstances, have raised up for the defence of the rights and immunities of the people of England. It is an apprehension that the existence of a Deputy Speaker might immediately or remotely lead to such a result, which has alone prompted any expression of regret at the creation of such an office, or desire for its discontinuance.

SECTION IV.

On the Procedure of the Supreme Courts of Common Law.

THE injurious influence which the Norman conquest had upon the Common Law is still perceptible, at the distance of 750 years from the date of that event. It was the Norman conquest which introduced the feudal system with all its complicated and oppressive attendants; the Norman lawyers

sowed the seeds of those endless subtleties and distinctions which once bewildered and still perplex every part of our judicial system; and it is to the Norman invasion and Norman lawyers combined, that the heterogeneous mixture of English, French, and Latin terms may justly be attributed, which renders our legal phraseology to this day the most enigmatical and repulsive which has ever prevailed in a refined community. Almost everyone who endeavours to gain an acquaintance with the laws of Greece, Rome, or any of the civilized states in modern times, will acknowledge that in none of them is a clear apprehension of the meaning of the technical words and phrases employed, attended with half so much difficulty as is experienced in the study of the Common Law of England. Laborious attempts have indeed been made to shew that the revolution which William I. accomplished in the government of the country had but an inconsiderable influence on its jurisprudence;* but whatever credit may be due to the facts that have been advanced, they are insufficient to support the superstructure that has been raised upon them. Unless the laws of William and his successors had, either in substance or in the means adopted for their execution, been decidedly inferior to that collection of institutions usually ascribed to Edward the Confessor, the earnestness and perseverance with which the restitution of the Saxon laws was demanded remains inexplicable. None of the

* Hale's Hist. of Com. Law, p. 102 et seq. Luders's Dissertations, p. 341 et seq.

prejudices by which mankind are generally influenced, are at all sufficient to account for the enthusiastic attachment with which these ancient ordinances never ceased to be regarded. The supplications of a whole people are never called forth by an imaginary cause, and however defectively the wants and wishes of our ancestors on this occasion, may have been made known or recorded, enough remains to shew that they were neither ignorant nor capricious. All those traces of the temper and spirit of the Saxon laws which remain, especially such as relate to the forms of procedure and means by which justice was administered, lead us to conclude that had the principles adopted by them been permitted to become the groundwork of our present municipal code, receiving such additions and improvements as the extension of commerce and advancement of society rendered necessary, its rules would have been less intricate and artificial, its language nearly approaching to that in common use, and its practice more simple and intelligible than we now find them. “There was one mischief,” says Blackstone, in speaking of the Norman conquest and Norman language, “too deeply
“rooted thereby, and which this caution of King
“Edward came too late to eradicate. Instead
“of the plain and easy method of determining
“suits in the County Courts, the chicanes and
“subtleties of Norman jurisprudence had taken
“possession of the King’s Courts, to which every
“cause of consequence was drawn. Indeed that

“ age and those immediately succeeding it, were
“ the era of refinement and subtilty. There
“ is an active principle in the human soul that
“ will ever be exerting its faculties to the utmost
“ stretch, in whatever employment, by the acci-
“ dents of time and place, the general plan of
“ education, or the customs and manners of the
“ country, it may happen to find itself engaged.
“ The northern conquerors of Europe were then
“ emerging from the grossest ignorance in point
“ of literature ; and those who had leisure to cul-
“ tivate its progress, were such only as were clois-
“ tered in monasteries, the rest being all soldiers
“ or peasants. And unfortunately the first ru-
“ diments of science which they imbibed were
“ those of Aristotle’s philosophy, which were
“ brought from the east by the Saracens into
“ Palestine and Spain, and translated into barba-
“ rous Latin. Both the divinity and the law of
“ those times was therefore frittered into logical
“ distinctions, and drawn out into metaphysical
“ subtleties with a skill most amazingly artificial ;
“ but which serves no other purpose than to shew
“ the vast powers of the human intellect, however
“ vainly or preposterously employed. Hence law
“ in particular, which being intended for univer-
“ sal reception ought to be a plain rule of action,
“ became a science of the greatest intricacy ; es-
“ pecially when blended with the new refinements
“ engrafted upon feudal property : which refine-
“ ments were gradually introduced by the Norman
“ practitioners, with a view to supersede the more

“homely but more intelligible maxims of distributive justice among the Saxons. And to say the truth, these scholastic reformers have transmitted their dialect and finesses to posterity, so interwoven with the body of our legal polity, that they cannot now be taken out without a manifest injury to the substance.”* In most of these respects, Equity, being of much later origin than Common Law, possesses over it a decided advantage. To whatever charges the Equitable law of England may justly be liable, it cannot be denied that the terms and phrases which it has introduced, are in general much less removed from those of ordinary speech, and its forms are also less strict and technical. There are some to be found who, from the force of habit, or a disposition to question every thing felt or admitted by the rest of mankind, deny these peculiarities of the Common Law to be any inconvenience, either in the study of it as a science or its pursuit as a profession. Until difficulty and abstruseness shall be made a test of excellence, it would be superfluous to contend with disputants of this description. Taking it for granted therefore that every thing which is uncouth or mysterious in the terms, phraseology or procedure of the Common Law is a serious practical disadvantage, it is one from which there is little prospect that it ever can be wholly relieved. Much however may be done to allay it, as well as to correct the anomalous in-

* Blackstone's Com. vol. 4. p. 416.

consistent and useless rules which must encumber a body of practice which has been permitted to drag on for centuries unreduced and unreformed. Without attempting to enter into a commentary on the merit or demerit of each successive step which is taken in the course of a suit at law, a few of them shall be selected for examination, in order to afford sufficient ground for concluding, that with skill and patience a variety of decided amendments might now be suggested in almost every part of the system.

1. An action may commence in the three Courts of King's Bench, Common Pleas, and Common Law side of the Exchequer, in 3 different ways. In the King's Bench by *bill of Middlesex* or *latitat*: by *common* or *special original writ* out of Chancery, in the case of common persons, peers, and corporations: by *attachment of privilege* at the suit of attornies and officers of the Court: and by *bill* against prisoners in the actual or supposed custody of the Marshal of the King's Bench prison, attornies and officers of the Court, and members of the House of Commons. In the Common Pleas, by *common* or *special original writ* also out of Chancery, by *capias quare clausum fregit* founded on a supposed *original*, by *attachment of privilege* at the suit of attornies and officers of the court: and by *bill* against attornies, officers and members of the House of Commons. In the Exchequer, by a *species of original writ* against peers and members of the House of Commons: by *quo minus capias*: by *subpœna*: by *capias of privilege*

at the suit of attornies and officers of the court : and by *bill* against attornies, officers and prisoners.* All of these will be found to differ more or less from each other, according to their nature or the court in which they are instituted. The plaintiff has therefore great choice in the nature of actions, and their costliness is as various as their natures. An action commenced by *common original* is more expensive than one commenced by *bill*; and one commenced by *special original* is more expensive than a *common original*. No appeal lies from a judgment pronounced in an action begun in any of the Common Law courts by *original*, except to the House of Lords. It is also an established rule, that upon the issuing of *special originals*, or even of *common originals* in actions of debt where a Writ of Error to the House of Lords has been filed,† a fine is paid to the King, corresponding to the amount of the sum recovered by judgment, or of the debt claimed in the action. These fines were at first imposed in order to purchase the indulgence or favour of the Sovereign and his judges, at a period when justice was too often made the subject of traffic,‡ and form at this day one of the most odious exactions by which its free administration is obstructed. A case occurred some time ago, in which a bond having been given by a person who could only be effectually sued by an *original*

* Tidd's Practice, 3d ed. p. 66, et seq.

† Boote's Suit at Law, p. 34.

‡ Hale's History of the Common Law, p. 152.

writ, and as the amount of the bond was so large that the fine payable on obtaining the writ being at the rate of £5 for every £1000, would have amounted to between £1000 and £1500, that circumstance of itself prevented the enforcement of the demand, as the estate of the person who was entitled to sue was then insolvent.* This no doubt is an extreme case, but extreme cases are not so rare as is always imagined, and it is by means of them the hardship of any general law or usage can most easily be demonstrated. If it had been publicly known that considerable sums are annually levied by this ungracious impost, it would no doubt have been included among the law taxes which so much to the credit of the government and jurisprudence of the country have been recently repealed.

Besides the complication which results from these various ways of commencing an action, and the chargeableness with which some of them are attended, it is further increased by a number of steps which are still presumed to have taken place, but have now fallen into disuse, or degenerated into mere formality. If an action is begun in King's Bench by *bill*, the bill which is supposed to be addressed to the judges of the court is fictitious. If an action is begun by a common original in Common Pleas it is unnecessary, and if begun there, or in the court of King's Bench, by a *special original*, that writ is almost always ficti-

* First Report of the Fee Commissioners, p. 87.

tious.* As the three writs of *capias*, *alias*, and *pluries*, which are supposed to be issued one after another when required to enforce the appearance of the defendant, are really made out all at once by the plaintiff's attorney without the defendant receiving the slightest notice of them, these writs are substantially fictitious,† and the two names which the plaintiff still goes through the ceremony of producing as pledges for the prosecution of his suit are idly and grossly fictitious. The *bill* with which one of the actions which may be raised in King's Bench now really begins, supposes the defendant to be in the custody of the Marshal of the King's Bench prison, in order to give the Court jurisdiction. This is fictitious. And when it is alleged in an action in Exchequer that the plaintiff is the King's debtor, in order to give the Court jurisdiction, that allegation in almost every instance is fictitious also. Even a defendant who refuses to appear to an action in obedience to the process of the Court, however severely he deserves to be visited for his neglect or contumacy, is supposed to be guilty of an act which must in strictness be pronounced fictitious. By the process of the court he is treated as an outlaw, and punished for the crime of rebellion.‡ He is put out of the King's protection, his goods forfeited, his person imprisoned, and the profits of his land sequestered for the use of the Crown;

* Boote's Suit at Law, p. 37 and 28.

† Id. p. 31.

‡ Tidd's Practice, 3d ed. p. 127.

measures as inappropriate to the offence as useless to the plaintiff, whose indemnification ought not to have been neglected. These are produced merely as specimens of the fictions, peculiarities, and redundancies, which in our courts of Common Law lengthen and perplex the very first stage of the road to justice; and it is hard to say to what extent, if it were necessary, the catalogue of such imperfections might be multiplied.

Upon the uselessness of some of the proceedings required at the beginning of a suit at law, the author whose book is regarded as a manual on the subject, has expressed himself to the following purpose:—"Now when we consider the nature
"of these beginnings of a suit, that is, the *bill*
"which is supposed to be filed in the King's
"Bench, and the *original* which is supposed to
"be sued out, returned, and filed in the Common
"Pleas, and the formal parts of our pleadings
"which depend on each of them; when, I say, we
"consider the obscurity that appears therein, we
"conclude, that though these and the formal part
"of the subsequent proceedings dependent on
"them, might in antient times have been necessary and material, yet at this time they are
"become useless and unnecessary, and almost
"unintelligible forms; and that what were then
"introduced for conveniency, are now antiquated
"as to their use. And yet these are continued
"as things wonderfully material, and with much
"exactness followed; though one may venture to
"say, as it is very certain, that they only serve

“ to swell the bulk of the subsequent proceedings,
“ and very unnecessarily increase the expense of
“ a suit, if no other inconveniences depended on
“ them.”

“ For with respect to the *bill* supposed to be
“ filed in the King’s Bench, it is thereby asserted
“ that the defendant is in the custody of the
“ Marshal, which is fictitious; also that *pledges*
“ are given by the plaintiff to prosecute, which is
“ altogether as untrue. Nor does it appear that
“ ever any process issued requiring pledges, or
“ that ever any pledges were found in this court;
“ yet with these the *declaration* is concluded, and
“ the *memorandum* at the beginning of the *issue*,
“ with the *imparlance*, depend on and refer to it,
“ as most of the subsequent pleadings do in some
“ respect or another. And yet what is this *bill*
“ but a mere formal thing, grounded on fiction
“ and full of falsities, and which is indeed never
“ filed but of necessity? For the statute of Jeo-
“ fails helping the omission of filing and continu-
“ ing it on the roll, if there is no writ of error
“ brought there is no bill filed; and in case a writ
“ of error is brought, such a bill may be filed at
“ any time before errors are assigned. But is it
“ not ridiculous to think that a judgment should
“ be set aside for error, for want of such a piece
“ of formality? What is the intent of it that makes
“ it so necessary? Why it gives the court its
“ jurisdiction. And with respect to the *original*
“ out of Chancery, is it not just such another
“ formal, useless, and unnecessary process, which

“ draws after it many inconveniences, and formal
 “ matters in the subsequent pleadings? Does it
 “ not create an extraordinary charge for the
 “ *capias*? Is not the *fine*, when taken, an unneces-
 “ sary expense? They are in themselves evi-
 “ dently unnecessary, because we often do with-
 “ out, and indeed never file a *bill* or a *special*
 “ *original*, but in cases where they are particularly
 “ required, or purely to increase the costs of the
 “ defendant. Do not these proceedings render
 “ the beginning of a suit obscure and difficult?
 “ or, to speak paradoxically, is not a suit almost
 “ always ended before it is begun? For *judgments*
 “ are generally first obtained before the suits are
 “ thus formally begun; and then sometimes set
 “ aside for not being so. Besides, when a *judg-*
 “ *ment* is signed, which requires a special original
 “ to warrant it, and that original is not filed in due
 “ time, which is very often the case, there must
 “ be a petition to the Master of the Rolls, and an
 “ order drawn upon that petition, which order
 “ must be entered and filed, even for leave for the
 “ *Cursitor* to make it out; by which we see how
 “ proceedings may be enlarged and costs multi-
 “ plied, for what at this time may justly be deemed
 “ the most useless and unnecessary proceedings
 “ in a suit imaginable.”* Another writer, whose
 character as a lawyer has stood high from his
 own time to the present, expressed himself still
 more strongly a hundred and fifty years ago, when

* Boote's Suit at Law, p. 35—38.

the revision of several branches of the law was agitated, during the usurpation of Cromwell. He complains of there being “so many degrees of writs, as *original*, *capias*, *alias*, *pluries*, *exigent* and *proclamation*, and *capias utlagatum*, which require many returns, which also must have many days between the teste and return day; and hereby much time is lost in every term; and all to this purpose, only to bring the defendant to appear, or else to outlaw him, which for 5*l.* will cost almost as much more.”*——“As to the cure hereof, it is offered,—1. To consider what to do about the taking away of all writs to arrest and imprison—to bring men to appear to actions personal and mixed—and all writs and outlawries thereupon—and outlawries after judgment—and all bills of Middlesex, *Lattits*, and attachments of privilege for appearance in all Courts of Record—and all arrests by the mace, serjeants, and the like; except in special cases, as in case of a fugitive, and a merchant and tradesman; and then by license of the court. And instead thereof, that there be a summons much like to the Court of Chancery, save only that it express the very cause of action, or that a copy of the declaration be left with the summons, under the hand of the plaintiff or his attorney: and to make this serve in all cases, save only in the trial of titles of land, instead of the original writ and all other process that was

* Shepherd's England's Balme, London, 1657, 12mo. p. 65.

“ used, and did serve to bring the defendant to
“ appear.”*

Without examining the practicability of the specific reform here proposed, or proceeding to suggest any other in its stead, it may be sufficient to advert to a few obvious maxims according to which that part of the judicial procedure of every country ought to be framed, which is intended to bring the parties before the court. One of these is, that the jurisdiction which every court is permitted to exercise, ought either to be distinctly prescribed or recognised by the legislature. Whatever alterations time or circumstances render necessary, should be made avowedly and deliberately, and not introduced surreptitiously as acts of assumption or contrivance proceeding from the courts themselves. More or fewer vestiges of the violence or dissimulation which has been practised always remain behind, and though they produce no marked sensation, they neither pass unobserved by suitors or the public. They are seen and felt to be proofs of a departure from that strict adherence to truth and plain dealing, which should characterise every step taken by tribunals of justice or under their authority. As the jurisdiction of every court ought to be clear, the access to it ought to be open. Every man who has a right to sue, ought to be at liberty to sue in his own name and at his own pleasure. Unless the Crown, or its officers, are truly the prosecutors of the suit, they ought

* Shepherd's England's Balme, p. 68.

never to be represented to the world in that light, and the interposition of their names generally tends to induce a misconception of the nature of the point in question, and sometimes becomes a hardship on the real litigants. If the concurrence of public servants is required as a preliminary to an action, they ought then to appear as accessaries and not as principals, and the real plaintiff ought neither to be clothed with their power nor subjected to their influence. While this indulgence seems due to plaintiffs on the one hand, equal care should be taken of the interest of defendants on the other. Whatever shape the notice, writ, or summons, with which a defendant is served at the beginning of an action may be made to assume, it should be couched in as few and plain words as possible. It should be directed personally to himself, and should set forth the complaint which has been made against him, and where and when he should appear to answer it. It is likewise reasonable that he should be made acquainted with the consequences of his disobedience; and in case of negligence or contumacy the steps taken to enforce the order of the court should be as few, prompt, and efficient as they can easily be rendered. To what precise extent the process used in the Common Law Courts for compelling the appearance of a defendant has departed from these standard rules, is not here made a question. The inference intended to be drawn from the particulars which have been mentioned is, that this departure has become so considerable, as to

..

afford just ground for revising the whole of this part of our judicial procedure, with a view either to correct the abuses which may have glided into the practice of each of the courts, or to devise one uniform system for their general direction.

2. As it is the object of the writ to compel the defendant to appear in court at the time specified, either in person or by counsel, to answer to the charge brought against him, it was antiently the practice for himself or his counsel then to appear and make his defence orally at the bar. “ This
 “ method of pleading *vivá voce*, universally in use
 “ among the early European judicatures, and, in-
 “ deed, the natural practice of all countries where
 “ the arts of civilization have made little progress,
 “ certainly prevailed in the English Courts in the
 “ reign of Henry III. and is generally supposed to
 “ have remained there till a much later era. These
 “ oral pleadings were delivered either by the party
 “ himself or his *pleader*, called *narrator* and *advoca-*
 “ *tus*; and it seems that the rule was then esta-
 “ blished that none but a regular *advocate*, or, ac-
 “ cording to the modern phrase, barrister, could
 “ be a pleader in a cause not his own. It was the
 “ office of the Judges to superintend, or according
 “ to the allusion of a learned writer, to *moderate*
 “ the oral contention thus conducted before them.
 “ In doing this, their general aim was to compel
 “ the pleaders so to manage their ultimate allega-
 “ tions, as at length to arrive at some *specific point*
 “ *or matter affirmed on one side, and denied on the*
 “ *other*. When this matter was attained, if it

“ proved to be a point of *law*, it fell, of course, to
“ the decision of the Judges themselves, to whom
“ alone the adjudication of all legal questions be-
“ longed; but if a point of *fact*, the parties then
“ by mutual agreement referred it to one of the
“ various methods of trial then practised, or to
“ such trial as the Court should think proper.
“ This result being attained, the parties were said
“ to be *at issue, ad exitum*, that is, at the *end* of
“ their pleading. The question so set apart for
“ decision, was itself called *the issue*; and was
“ designated according to its nature, as either an
“ issue in *fact*, or an issue in *law*. The whole pro-
“ ceeding then closed, in case of an issue in *fact*,
“ by an award or order of the Court, directing
“ the institution, at a given time, of the mode of
“ trial fixed upon; or in case of an issue of *law*,
“ by an adjournment of the parties to a given day,
“ when the Judges should be prepared to pro-
“ nounce their decision. During this oral alterca-
“ tion, a contemporaneous minute in writing was
“ drawn up by one of the officers of the Court, on a
“ parchment roll, containing a transcript of all the
“ different allegations of fact, to the issue inclusive.
“ And in addition to this, it comprised a short notice
“ of the nature of the action, the time of the ap-
“ pearance of the parties in Court, and the acts
“ of the Court itself during the progress of the
“ pleading. The official minute of the pleading,
“ and other proceedings, thus made on the parch-
“ ment roll, was called ‘The Record.’ As the

“ suit proceeded, similar entries of the remaining incidents in the cause were, from time to time, continually made upon it; and, when complete, it was preserved as a perpetual, intrinsic, and exclusively admissible testimony of all the judicial transactions which it comprised. From the beginning of the reign of Richard I. commences a still extant series of records, down to the present day; and such, as far back as can be traced, has always been the stable and authentic quality of these documents in contemplation of the law.”*

This part of the action by which, in civil cases, the subject in dispute between the plaintiff and defendant is brought to issue, still receives in common language the name of *special pleading*. Special pleadings are seldom drawn now by barristers, but generally by gentlemen who intend to be afterwards called to the bar, whose attention during the early part of their professional course is exclusively devoted to their preparation. If special pleading is estimated by the precision which it has introduced into the discussion and adjudication of causes, it appears to be a branch of Common Law procedure which is entitled to very great commendation. No other country can perhaps be pointed out, where the matters in dispute between the plaintiff and defendant, whether

* Stephen, on the Principles of Pleading, p. 29—among the most scientific treatises yet published on any branch of English law.

consisting of questions of fact, or questions of law arising upon facts mutually admitted, are so distinctly brought to issue as in England. But the extremes to which an excellent plan may be carried, either defeats the end for which it was introduced, or may be made to cost more than the attainment of the end is worth. Substantial justice may be as effectually defeated by excessive nicety on the one hand, as by the greatest laxity on the other. Whether this is the case with the present system of special pleading or not, the rules by which the exactness it produces are secured, have been thought so unnecessarily strict, that for upwards of 200 years they have been made the subject of the severest animadversion.

Lord Coke observed, about the end of the 15th century, " That in the reigns of Edward II., Edward I. and upwards, the pleadings were plain and simple, but nothing curious, evermore having chief respect to matter and not to forms of words. In the reign of Edward III. pleadings grew to perfection, both without lameness and curiosity; for then the judges and professors of the law were excellently learned men, and the knowledge of the law flourished."* Fifty years after him, Lord Hale complains of their having become far more complicated. In speaking of the times between Henry IV. and Henry VII. he says, " Though pleadings in the times of those kings

* Coke upon Littleton, 304 b.

“ were far shorter than afterwards, especially
“ after Henry VIII., yet they were much longer
“ than in the time of Edward III., and the plead-
“ ers, yea, and the judges too, became somewhat
“ too curious therein, so that art and dexterity of
“ pleading, which in its use, nature, and design,
“ was only to render the fact plain and intelligible,
“ and to bring the matter to judgment with a con-
“ venient certainty, began to degenerate from its
“ primitive simplicity and the true use and end
“ thereof, and to become a piece of nicety and cu-
“ riosity, which how these latter times have im-
“ proved, the very length of the pleadings, the
“ many and unnecessary repetitions and miscar-
“ riages of causes upon small and trivial niceties
“ in pleading, have too much witnessed. The
“ reasons whereof seem to be these, first, because
“ in antient times the pleadings were drawn at
“ the bar, and the exceptions also taken at the
“ bar, which were rarely taken for the pleasure or
“ curiosity of the pleader, but when it was appa-
“ rent the matter excepted to was the very merit
“ and life of the cause, and purposely omitted or
“ mispleaded because the matter would bear no
“ better: but now the pleadings being first drawn
“ in writing, are drawn to an excessive length,
“ and with very much care and laboriousness en-
“ larged, lest it might afford an exception not
“ intended by the pleader, and which could easily
“ be supplied from the truth of the case, lest the
“ other party should catch the advantage, which

“ commonly the adverse party studies, not in con-
“ templation of the merits or justice of the cause,
“ but to find a slip to fasten upon; though in
“ truth either not material to the merits of the
“ plea, or at least not to the merits of the cause.*
“ The inconveniences in the multiplicity, and in-
“ conveniences of suits and actions as the present
“ state of things stands, and the means how to
“ rectify it,”† also forms one of the heads which
that admirable person intended to have discussed
in his treatise on the amendment of laws, but
which he unfortunately did not live to finish.
Shepherd, who wrote about the same period, both
admits the evil and proposes a remedy. His
words are these:—“ It is objected the pleadings,
“ after the appearance, and between it and the
“ judgment, are very tedious, chargeable, and
“ dangerous, because many, and these very nice
“ and curious; so that sometimes by the mistake of
“ one word, or not continuing the action one term,
“ a good cause is lost, and the plaintiff undone by
“ his prosecution. And this long pleading is
“ worse in an action of covenants for breach of
“ covenants, actions of the case for nuisances,
“ and in avowries; and for a very small defect in
“ some circumstance in the declaration, the de-
“ fendant will demur to it, and put the plaintiff to
“ begin all again.” “ It is offered as to the cure
“ hereof that these things be considered: 1. To

* Hale's History of the Common Law, p. 172.

† Hargrave's Juridical Tracts, p. 275.

“ shorten the pleadings, and to have set forms set
 “ down for declarations and pleas, to which all
 “ the declarations and pleas in all cases shall be
 “ reducible, or at least to shorten the pleadings
 “ where they are so tedious. 2. That no excep-
 “ tion be against, nor advantage taken of any
 “ pleadings, but within eight days after it, and
 “ then that it be amended by the Court. 3. That
 “ no demurrer be to any declaration for any imper-
 “ fection in matter of form, if the substance be set
 “ down. 4. To shorten the degrees of proceed-
 “ ings on days of pleadings.”* The length and
 intricacy of pleadings must still have been regarded
 as a serious grievance, for they are thus spoken
 of by a writer who lived near a century afterwards.

“ As to special pleadings at law, I humbly offer
 “ it to consideration, whether it would not be a
 “ great happiness to the suitors to take them away
 “ entirely, and that the general issue should be
 “ pleaded in all cases. The only use I could ever
 “ conceive of special pleadings (besides the great
 “ gains they bring to the attorney, officers, and
 “ counsel) is to reduce the matters in difference
 “ between the parties to a single question, and
 “ thereby give each of them notice of what is to
 “ be proved and defended at the trial; otherwise
 “ they might meet there as unequally matched as
 “ when a man challenges another without naming
 “ the weapon, and then brings a pistol, and the
 “ other only a sword. But if either party be

* Shepherd's England's Balme, p. 73.

“ obliged to give reasonable notice in writing of
“ any special matter intended to be insisted on
“ or given in evidence at the trial, I should think
“ that method would make special pleadings use-
“ less, and that the merits of the cause might by
“ that method be as fairly and effectually tried as
“ by the help of special pleadings. I have already
“ mentioned what I take to be the use of special
“ pleadings, and as to the mischiefs attending
“ them I need say little, they are so well known.
“ The preamble of the statute of 27 Elizabeth of
“ Jeofails has recorded that Parliament’s opinion
“ of them in these remarkable words:—*That ex-*
“ *cessive charges and expences, and great delay and*
“ *hindrance of justice, hath grown in actions and suits*
“ *between the subjects of this realm, by reason that*
“ *upon some small mistaking, or want of form in*
“ *pleadings, judgments are often reversed upon writs*
“ *of error; and oftentimes upon demurrer in law,*
“ *given otherwise than the matter in law and very*
“ *right of the cause doth require; whereby the par-*
“ *ties are constrained either utterly to lose their right,*
“ *or else, after long time and great trouble and ex-*
“ *pence, to revive again their suits.* Which act,
“ and the several other statutes of Jeofails, and the
“ express provisions made in several other acts
“ for the defendants to plead the general issue,
“ and give the special matter in evidence, do all
“ shew our Parliaments have long had a dislike
“ to special pleadings. And since by an esta-
“ blished rule, approved by long experience, the

“ general issue and nothing else, is always pleaded
 “ in ejectment, where the title of lands and pos-
 “ sessions are in question, I cannot see why it
 “ should not be pleaded in all other cases; espec-
 “ ally on giving notice, as aforesaid, of any special
 “ defence, which is an advantage the parties in
 “ ejectment are not bound to give each other.”*

At a still later period it would appear, from the following passage in the *Historical Treatise of a Suit at Law*, that the cause of complaint had not then diminished:—“ Be it as it will, it must be allowed
 “ that the merit would be infinitely great in him,
 “ who should find means to reduce the pleadings
 “ to a more concise and simple form, or chalk out
 “ some method intirely to supply the use of special
 “ pleadings. How many instances may be given
 “ where, by pleading generally, a cause might have
 “ been tried upon an issue of no more than 10, or
 “ 12, or 14 sheets, which by special pleadings has
 “ been spun out to 100, 150, or 200 sheets, and
 “ which, where the matter in dispute has not been
 “ above five shillings value, has cost the party
 “ £200. Is this unknown to the law? Is it not
 “ enough to deter any man from taking a remedy
 “ to protect his right and property? If what
 “ these learned judges have said was before the
 “ act for pleading several matters, what shall we
 “ say now, when special pleadings are so greatly
 “ increased, and are drawn with so much labour

* Proposals for remedying the great Charge and Delay in Suits at Law and in Equity, by an Attorney, London, 1725.

“ and nicety, and so vastly spun out as to render
“ an issue of such prodigious length ?”*

These authorities seem sufficient to shew that valuable as the system of special pleading is admitted to be, a strong sense of its imperfections has long been felt and expressed, accompanied with an anxious desire for its reformation. That this should be the case, will not to any one who opens a practical treatise on the subject appear at all surprising. The multitude of distinctions and refinements which have been accumulated by usage, statutes, and the decisions of the Courts, have rendered special pleading singularly prolix and mysterious. They have had another effect still more to be lamented : the extreme technical accuracy with which every part of the pleadings must be drawn, together with the numerous and curious precautions which must be taken to insure their sufficiency, instead of affording either to the parties or their advisers that plain and distinct information respecting the real grounds of the action or defence against it, to which they are reciprocally entitled, have caused or increased that very uncertainty and perplexity which they are intended to prevent. Perhaps no better method could be adopted of bringing back special pleading to its true end and object, than to undo part of that which has been already done. It may be hard to say to what precise extent the niceties and distinctions which have grown up in the sys-

* Boote's Suit at Law, p. 121.

tem might safely be removed, but it is impossible to take the most cursory survey either of the *form or component parts* of the plaintiff's *declaration*, which is the first as well as most important part of the pleadings, without being strongly impressed with a conviction that in various particulars it is capable of considerable simplification and amendment.

The form of a *declaration* is determined by the nature of the action. In no two sorts of action is its form precisely the same. To comprehend therefore, the variety of forms of a *declaration*, it is necessary to attend to the chief sorts of actions which are now in use. Actions are divided into *real, personal, and mixed*. *Real actions* are of four different sorts, *writ of entry, writ of right, writ of formedon, and writ of dower*. *Personal actions* may arise either *ex contractu* or *ex delicto*. Those which arise *ex contractu* are the actions of *assumpsit, debt, covenant, detinue, and account*, which last is now seldom, if ever, used. Those which arise *ex delicto*, are *case, trover, detinue, replevin, and trespass*. Of *mixed actions*, there are only two which it seems necessary to mention, *ejectment and waste*.

Upon the four sorts of *real actions* it may be sufficient to observe that they are scarcely ever resorted to but when they cannot be avoided. That of *dower* is occasionally, though seldom, employed, and that of *entry, right, and formedon*, still more rarely. *Ejectment* has in those cases where there has not been an adverse possession for twenty years, been so modified as to supply

the place of a *writ of right*, and it would have been desirable if it could have been so modified as to do so universally. The cumbrousness and difficulty of some *real actions* has caused them to be frequently forsaken for others in which there is less peculiarity and strictness, and it is more than probable the same lot would have awaited many others which are still in vogue, if two or three brief and well-contrived general forms of action had been introduced and encouraged. With respect to the five actions which arise *ex contractu*, only four of them are of any use. As accounts are now generally settled by Bill in Equity, the action of *account* has, in a great measure, fallen into disuse.* And with respect to the remaining four, it may be doubted whether there is any solid reason for splitting them into four different sorts. *Assumpsit* is an action for the recovery of a sum of money in the shape of damages for non-performance of a parol or simple contract. The action of *debt* is also for the recovery of a sum of money, with this difference, that it is specifically due as a debt, and usually secured by *deed*; and as the action of *covenant* is always for damages, which either are or may be rendered certain, there is perhaps no other reason for such a separate action, except that it is necessary to be supported by a *contract under seal*.† That different sorts of proof must be required in different actions for debt is abundantly manifest; but that this should in any

* Selwyn's *Nisi Prius*, v. i. p. 1. 3d edit.

† 1 Chitty on Pleading, p. 88.

two cases create a difference in the form of the actions themselves is not apparently requisite; and that the circumstance of one claim being constituted by *bond* and another by a *contract under seal* should have this effect, seems still more unnecessary. Subtle distinctions like these always prove eventually inconvenient. Practitioners themselves sometimes hardly know how to preserve the boundaries between *debt* and *assumpsit*,* nor between *covenant* and *debt*,† nor between *covenant* and *an action on the case for a tort*.‡ With respect to the action of *detinue*, though the object of it is to recover the possession of the identical thing for which the action is brought, yet the remedy it gives is of so inept a nature, that the object cannot be obtained if the defendant chooses to resist it. It is distinctly laid down that it is in the election of the defendant, “whether he will deliver the specific goods or “pay the value thereof and damages for the detention.”§ Respecting actions which arise *ex delicto*, the distinction between those *in trespass*, where the injury is *immediate* and *direct*, and those *on the case* where the injury is *mediate* and *consequential*, the separation between them becomes occasionally imperceptible;|| at least, it is difficult for the plaintiff to choose between the two, as well as in those instances where it is

* Chitty on Pleading, 94, 97, 107.

† Id. 110 and 111. ‡ Id. 115.

§ Selwyn's Nisi Prius, v. i. p. 608. 3d edit.

|| Chitty on Pleading, 122, 126, 136.

doubtful whether the injury originated in wilful misconduct, or arose from negligence. In actions of this nature, as between those of *trespass*, *case*, *replevin*, *trover*, and *detinue*; or between *case* and *assumpsit*, *trover*, and *trespass*, it may certainly be said that the plaintiff has it in his power to take his choice among the remedies which the law affords; but if this is to be coupled with the risk of one or two nonsuits, together with the expense and delay which they occasion, he will soon find himself, like Narcissus in the fable, impoverished by this perplexing plenty.

Quid faciam? roger, anne rogem? quid deinde rogabo?

Quod cupio mecum est, inopem me copia fecit.

Only that division of actions which is called *mixed* remains to be noticed, and the two actions comprehended under it which are most familiarly known are the actions of *ejectment* and *waste*. As the action of *ejectment* is that by which titles to land are now usually tried, it is on that account deserving of some attention. This action has undergone various successive changes since its introduction in the reign of Edward III.,* and the Court of Chancery at one time gravely doubted whether one of the steps taken in it did not amount to the statutory crime of maintenance.† It does not begin like other actions by suing out a writ,‡ but by a declaration which is delivered by the person claiming the land to the person actually in

* Adams on Ejectment, p. 7—14. † Id. 179.

† 1 Chancery Reports, App. 39.

possession, and in its subsequent stages bears little analogy to the manner in which other actions are conducted. In this declaration two fictitious persons, A and B, are introduced on the occasion, and made plaintiff and defendant. A. alleges himself to have received a lease for a certain number of years from the real claimant, and complains of having been ousted from his possession by B. To this declaration a supposed notice is annexed by B, in which he informs the person actually in possession of the land of these proceedings, and advises him to apply to the court for liberty to defend the cause, as he himself having no right shall leave it undefended. If the possessor does not within a certain space make this application, judgment is given against B the fictitious defendant, and the claimant is forthwith put into actual possession. If the possessor asks leave to defend the action, the court will only grant it upon the following conditions. As there are four requisites to ejectment, *title, lease, entry* and *ouster*, and as the three last of these are fictitious, the possessor is obliged to confess that he will not dispute them, but proceed to defend himself on the strength of his title alone. The real defendant then takes place of the fictitious one, and the subsequent proceedings follow the same course with those in other cases. Such is the action of ejectment, “introduced,” as Lord Mansfield has described it, “within time of memory, and moulded gradually into a course of practice by rules of the courts. The same authority which brought it thus far, may certainly

“ carry it to a higher degree of perfection, as experience happens to shew inconveniences or defects.”* Its defects may really be said to consist in its redundancies. As happens on many other occasions in the law of England, there are twice as many characters and incidents introduced as contribute to the advancement of the object of the piece. Allow all mention of *lease*, *entry*, and *ouster*, as well as of the supposed plaintiff and defendant, to be suppressed; and two fictitious persons, three fictitious proceedings, and all the confusion, expence, and delay created by their useless interposition will in future be avoided. There will then remain the only necessary parties in the action of ejectment, the claimant of the lands on the one hand, and the possessor on the other; and on the former delivering to the latter the declaration which contains his claim, no reason can be imagined why they should not proceed to contest the merits of it exactly as they do at present. In addition to this it may be observed, that if any method could be devised by which all persons claiming any interest in lands should be entitled to maintain an action of ejectment, and if nothing but the 20 years possession required by 21 James I. c. 16. could bar its prosecution, it would become the more useful; or an amendment of the writ of right might supersede it altogether.

Besides the particular objections which present themselves to the subordinate classification

* 3 Burrow's Reports, 1195.

of actions, others, perhaps still better warranted, may be urged against its more general divisions. The distinction between actions *ex contractu* and *ex delicto* seems to have no just foundation. The non-performance of one infers no more real criminality than that of the other. It is true that in one of the actions *ex delicto* it has ridiculously become necessary to allege that the act complained of was done *vi et armis et contra pacem domini regis*, but not one of these actions is at all of a criminal nature, and to class them as such, serves only to destroy the difference which exists in most men's minds between crimes and other offences. Even the distribution of actions into *real*, *personal*, and *mixed*, however universally it may have subsisted, is not very satisfactory. It might just as well have been made to depend on the means of proof or nature of the remedy provided, and not one of the three seem to rest upon any principle either of reason or convenience. If the forms of actions could in any way be simplified, either by breaking down some of the walls of partition which separate those which now exist, or by introducing two or three of those general forms of action that have been mentioned, allowing plaintiffs full liberty to betake themselves either to the old or new as they might judge expedient, such a measure would perhaps not only be useful in itself, but advantageous in every subsequent stage of the pleadings. If the plaintiff had more than one cause of action against a defendant at the same time, he would

by that means be relieved from the difficulty under which he is now placed of conjoining them or electing between them;* and a defendant would be able to set forth good defences with greater facility. It has been justly observed that “some doubt may reasonably be felt with respect to the advantage of that part of the system which relates to the *singleness* of the issue. Provided only that a party be restrained from raising issues inconsistent with each other, or such as he knows to be without foundation in fact, it may be questioned whether any sufficient considerations of utility or convenience can be urged at the present day, in favour of the object of singleness. At all events some presumption must arise against the value of this object, in modern pleading, when we recollect that the long permitted use of several counts, in respect of the same cause of action, and the provision of the statute of Anne, allowing the use of several pleas, have declared it as the sense both of the bench and legislature, that if the original principle deserved to be retained, it required at least material mitigation. However, it is clear that the principle of singleness is so far, at least, a right and valuable one, as it may tend to prevent the parties from offering inconsistent allegations, or such as they may know to be false. For though the interests of justice seem to require, in many cases, the allowance of se-

* Chitty on Pleadings, p. 199.

“veral counts or pleas in respect of the same demand, they are, on the other hand, directly opposed to the allowance of repugnant ones—and where one of the matters alleged must evidently be false, the party should, of course, be obliged to make his election between them : and so in allowing a party to make different allegations, he ought, if possible, to be excluded from such as (whether inconsistent or not with what has been previously pleaded) he must know to be without foundation in fact. Yet these, which are perhaps the only beneficial results that can flow from the principle of singleness, the present state of the law against duplicity, unfortunately fails to produce. For first, a Plaintiff is at liberty to adopt as many counts as he pleases, however apparent it may be that the cases which they respectively state, cannot all be true. So a defendant is allowed, under the provision of the statute of Anne, to plead, with scarcely any exception, matters directly inconsistent with each other—for example, he may plead, in trespass for assault and battery, not guilty, (namely, that he did not commit the trespasses), and also, son assault demesne, viz. that he committed them in self defence—or, in debt on bond, non est factum, (viz. that he did not execute the deed,) and also, that he executed it under duress of imprisonment. Again, a party is not restrained by the present system from adding, to his true case, another that, though consistent with it, he knows

“ to be false. And, accordingly, a defendant, at
“ the same time that he pleads a special plea,
“ founded on his real matter of defence, almost
“ always resorts to the general issue, or some
“ other plea by way of traverse, in order to put
“ the plaintiffs to the proof of his declaration—
“ without having, in truth, the least reason to
“ deny the allegations which it contains. The
“ statute of Anne, indeed, provides a check
“ against this, by a provision of which the general effect is as follows—that, where the defendant has pleaded several pleas, and the issue upon any one of them is found for the plaintiff, the Court may give the plaintiff, the costs of every such issue, unless the judge of *Nisi Prius* shall certify that the defendant had probable cause to plead the matter found against him. But the construction and effect given to this provision, in practice, seem to have rendered it inadequate to the object which it contemplates.* What were the circumstances which led to such needless precision respecting the *singleness of the issue* in actions, or the excessive variety of *forms* which actions might be made to assume, it would now be difficult to conjecture. That all the variety of forms of action under which we now labour, was believed to be necessary, is indisputable. The 13th of Edward I. c. 24. enacts, “ that if it shall fortune in the Chancery that in one case a writ is found, and

* Stephen on Pleading, p. 457.

“ in the like case falling under like law and re-
 “ quiring like remedy is found none, the clerks
 “ of the Chancery shall agree in making the writ,
 “ or adjourn the plaintiff until the next parliament;
 “ and that the cases be written in which they can-
 “ not agree, and that they shall refer such cases
 “ until the next parliament; and by consent of
 “ men learned in the law a writ shall be made, lest
 “ it might happen after, that the court should
 “ long time fail to minister justice unto complain-
 “ ants,” and even the Masters in Chancery them-
 selves, the Six Clerks, and Cursitors have all been
 employed in devising separate writs for the redress
 of separate wrongs and injuries. It is curious that
 in the Roman Law the same variety of actions should
 have prevailed as in our own. The Latin authors
 are full of passages which shew the exactness
 which was necessary in the form of an action;*
 and the favours which the republic bestowed upon
 Gnæus Flavius for the mere publication of the
 forms contained in the precedent book of his mas-
 ter Appius Claudius, which he stole or copied,
 strongly testify the degree to which the body of
 the people must have been vexed by this unneces-
 sary source of embarrassment: “ Postea cum Ap-
 “ pius Claudius proposuisset et ad formam rede-
 “ gisset has actiones, Gnæus Flavius scriba ejus li-
 “ bertini filius, subreptum librum populo tradidit,
 “ et adeo gratum fuit id munus populo, ut tribunus
 “ plebis fieret et senator et ædilis curulis.”† The

* Several passages are quoted in Adam's Roman Antiquities, p. 228.

† Digest. Lib. 1. Tit. 2.

object of this variety of actions is laudable, but the means taken to attain it are preposterous in theory, and in practice have produced an effect the very reverse of that which was intended. There are at present at least 15 well-known forms of action, and it might just as well be contended to be necessary and convenient to admit suitors into court by 15 different doors, as to prefer their complaints before it by 15 different sorts of action. The commissioners appointed in 1823 to inquire among other things into the best means of improving the forms of pleading in Scotland, received the following answer from one of the Judges of the Court of Session, whose opinion, both on account of its own intrinsic merit, and his reputation as a scientific and practical lawyer, well deserves attention: “ In respect to
“ the simplification of proceedings, I have to
“ observe, first, that I do not see why all civil
“ actions might not come before a Lord Ordinary in the first instance directly. I think
“ all would be as well done in the ordinary mode
“ of process, and that thus complexity and expence would be avoided, and time be saved to
“ the court: second, I do not see any sufficient
“ reason why all civil actions might not originate
“ by one form of libelled summons or petition,
“ instead of the variety we have at present: third,
“ I do not see why all actions on coming into court
“ might not proceed in the same way by defences,
“ &c. as above-mentioned, with the exception of
“ interdicted actions, which must be brought be-

“fore the judge by bill or petition.”* A still stronger confirmation of the practicability of simplifying the form of actions is derived from the usage of the Court of Chancery, where though a very complete, and in some respects too complicated system of pleading is established; no traces of the varieties of action which prevail in common law are to be found. One form of bill serves for all occasions whatever the nature of the relief prayed may be, and each plaintiff is permitted to adapt his narrative to the circumstances of his own particular case. The privilege now given to a defendant by almost all local and many general acts,† to plead the general issue, and put himself upon the country without specifically replying to the counts in the declaration tends very strongly to the same conclusion. The fact of the defendant being suffered in so many of these acts to plead the general issue in reply to the charge made, seems conclusively to prove both that the extraordinary specialty which is always required in the charge, and also in the defence in all but excepted cases, is unnecessary. Courts of Common Law, by allowing the defendant to plead the general issue so freely, may perhaps have shewn him too much indulgence. They may have proceeded from extreme strictness on the one hand, to a degree of laxity no less prejudicial on the other. A bill was

* Opinion of Lord Mackenzie, Appendix to Lords' Report of the Commissioners appointed to inquire into the Appellate Jurisdiction, p. 195.

† See particularly 5 Geo. II. c. 30, & 49 Geo. III. c. 121. sec. 10.

brought into the House of Commons between 1770 and 1780 on the propriety of permitting the defendant to plead the general issue in all cases, which was supported by Wallace then Attorney General, and opposed by Dunning.* There seems to be much doubt whether such a measure would have been beneficial. “Another feature of “doubtful character in the system of pleading,” it is said, “is the wide effect which belongs, in “certain actions, to the *general issue*. In debt on “simple contract—in assumpsit—and trespass on “the case, in general—the general issue embraces “almost every ground of defence to which the “defendant at the trial may chuse to resort—the “questions offered by these issues, being, in effect, “nearly these—whether the defendant be indebted “to the plaintiff, as alleged in the declaration, or “he be liable to the plaintiff’s demand, as set forth “in the declaration. Now, these questions are “so general and vague, as to produce, but in “a limited and inferior degree, the advantages “which attend the production of a more strict and “special issue. For first, they do not fully effect “the separation of matter of fact from matter of “law. To understand this, it must be considered “that though the parties cannot go to trial on a “mere question of law, (a traverse of matter of “law not being allowable,) yet it is in the nature “of many issues in fact, to involve some subordi- “nate legal question, the decision of which is es- “sential to the decision of the issue. And the

* Butler’s Reminiscences, p. 32.

“ wider and more general the form of the issue,
“ the more likely it is to comprise these subordi-
“ nate questions of law. For example—in an
“ action of debt on simple contract—or assumpsit,
“ if the defendant rely on a release executed by
“ the plaintiff, he may give this in evidence under
“ the general issue (*nil debet*, or *non assumpsit*),
“ because it tends to shew that he is not indebted,
“ or is not liable, as alleged—and if the plaintiff’s
“ answer to the release, be, that it was obtained
“ by duress, this will, of course, be also offered
“ in evidence under the same issue. Upon this
“ point of duress, two questions may be supposed
“ to arise—first; whether the execution of the
“ deed under duress would defeat the effect of
“ the deed—secondly, whether the deed were, in
“ fact, executed under duress. Before the jury
“ can find a verdict either for the plaintiff or de-
“ fendant, both these questions must be disposed
“ of. But the first is a question of mere law,
“ and their decision upon it must be guided by
“ the direction of the Judge. Here, then, is a
“ question of law involved under the issue in fact.
“ Now, if on the other hand, a form of action be
“ supposed, in which the pleading is more spe-
“ cial and the general issue less comprehensive,
“ for example, the action of covenant, this very
“ same question will be distinctly developed as a
“ point of law upon the pleading—by way of de-
“ murrer. For the defendant cannot, under *non*
“ *est factum* (which is the general issue in that
“ action), set up the release, but must plead it
“ specially—and the plaintiff must, consequently,

“ plead the duress in reply; and then if the defendant disputes the legal consequence of the duress, his course is to demur to the replication. Of such demurrer, occurring in the very case here imagined, the reader has already seen an example in the course of this work—and to this he may be again referred for further illustration. It thus appears, then, that it is the effect of the wider general issues to render less complete, than it otherwise would be, the separation of fact from law. And the inconvenience of this is felt, in the great frequency with which difficult legal questions arise for the opinion of the Judge at Nisi Prius—the numerous motions for new trials consequently made in the Court in Bank, to obtain a revision of such opinions—and the delay and expence necessarily attendant on a proceeding of this kind, when compared with the regular method of demurrer. Again, it is an inconvenience arising from general issues of this description, that they tend to conceal from each party the case meant to be made by his adversary at the trial. Thus, in the instance above supposed, the plaintiff would have no notice, from the nature of the issue, *nil debet*, or *non assumpsit*, that the defendant meant to set up a release, nor would the defendant, on the other hand, have any intimation that it was to be met by the allegation of duress. And thus is defeated, in some measure, another of the advantages otherwise attendant on the production of an issue—namely, that of apprising the parties of the precise nature of

“ the question to be tried, and enabling them to
“ shape their proofs without danger of redundance
“ on the one hand, or deficiency on the other.”*—

An inference which seems naturally to flow from the whole of the preceding observations is, that the mere form of the action has less connection with the real end of special pleading than has commonly been imagined. The *contents* of the declaration in an action are or ought to be more important than its *form*, and upon the parts of which a declaration is composed one or two observations shall now be offered.

A *declaration* consists of 7 parts, the *title*, the *venue*, or *place*, the *commencement*, the *statement of the cause of action*, the *counts*, the *conclusion or prayer*, and the *pledges to prosecute*. The last of these parts ought to be abolished as a repetition of the idle fiction previously noticed; and upon the first, third, fourth, and sixth of them no remark appears to be requisite, as upon the whole they seem to be sufficiently adapted to their purpose. The second, which sets forth the *venue*, is liable to some objection. The place where the cause of action arises should either be allowed by the law to be set forth truly, or should not be required to be set forth at all. In *transitory* actions the absurdity of the fiction is peculiarly striking. To allege that certain facts “ took place at Bengal in the East Indies,” followed by a “ viz. in the county of Middlesex in “ the ward of Cheap,” offers a degree of violence

* Stephen on Pleading, p. 460.

to common sense for which there is no necessity. Whatever learning and ingenuity can urge in defence of the application of the fiction has been advanced by Lord Mansfield in the case of *Fabrigas and Governor Mostyn*,* but the objection to the continuance of the fiction at all remains untouched, and it is melancholy to see that accomplished person labouring to demonstrate the wisdom of one of the most awkward contrivances which was ever invented for the purpose of enabling judges to reach the ends of justice. The fifth part of the declaration is that which contains the counts, and is the most material of the whole. These counts are merely different versions of the same story, and so rigorously does the present system of pleading require a case to be proved in the manner and form in which it is set forth, that these counts often amount to twenty, sometimes to thirty or forty, and in a few instances have nearly reached a hundred. It is obvious that all rational certainty or distinctness must disappear among such interminable variations. No case can arise in which they are necessary, and special pleading must have swerved greatly from its legitimate end before such an array of changes could either have been tolerated or attempted.

Into an examination of the succeeding parts of the pleadings, by which if necessary the attack and defence of the parties may alternately be varied; or of the checks to irregularity in pleading which are afforded by demurrer to any part of the pleading,

* *Cowper's Rep.* p. 176.

demurrer to evidence, bills of exceptions, pleas in *scire facias*, and pleas in error, it would be tedious to enter. Useful as they are, they are all overloaded with technicalities and refinements. But it is in the form of the action, and in the difficulty attending the preparation of the *declaration*, that the chief objection to the present mode of pleading is to be found. If the forms of action were simplified, or if a few concurrent general forms of action were introduced, which the plaintiff might adopt if he thought proper; and if the number of counts which it is necessary to insert, could be diminished; a marked improvement would take place in every succeeding stage of the pleadings, and a cause might be brought to issue with reasonable precision and with much less expense, hazard, and delay, than now attends it.

3. When a cause is brought to issue, it must either be an issue *in law* or *in fact*. If the issue is *in law*, the facts alleged by the plaintiff being admitted by the defendant, the matter in issue is determined by the Judges. It is only upon an issue *in fact*, where an affirmation of fact on one side is met by a denial on the other, that the interposition of a Jury becomes necessary. To indulge in any panegyric on the benefits of the trial by jury is commonly unnecessary, and would here be inappropriate. The affection felt for it by all classes of the community has remained unshaken during every revolution in religion, government, and manners which the country has experienced for upwards of a thousand years. Nothing but the most general and settled conviction of the

relief and protection it is calculated to afford, can account for the continuance of this attachment for such a succession of ages. But though it be true that during the whole of this lapse of time trial by jury has been invariably esteemed and cherished, the advantages resulting from its establishment have by no means been always equal. Its utility necessarily and essentially depends on the intelligence, moderation, firmness, and impartiality with which the duties of jurymen are performed. With these qualities it springs up; with them it comes to perfection; and according as they are cultivated or neglected, so must it flourish or decline. The numerous acts of parliament which have been passed in this country for the attaint of jurors attest the danger it has at various periods run from corruption,* and though this particular sort of hazard is not likely to recur, there are others scarcely less alarming to which it still remains exposed. The verdict of a jury may be influenced by passion, caprice, prejudice, or perverseness, as powerfully as by more sordid considerations; and perhaps their operation is the more extensive that it is neither so odious nor suspected. In all questions however, whether private or political, every kind of bias which diminishes that confidence entertained by the public that the verdict of the jury will be in strict accordance with the evidence, cannot be too

* 3 Ed. 1. c. 38. 1 Ed. 3. st. 1. c. 6. 5 Ed. 3. c. 7. 34 Ed. 3. c. 7. 11 Hen. 6. c. 4. 15 Hen. 6. c. 5. 18 Hen. 6. c. 2. 11 Hen. 7. c. 24. 12 Hen. 7. c. 2. 19 Hen. 7. c. 3. 11 Hen. 8. c. 11. 23 Hen. 8. c. 3.

anxiously guarded against. The qualifications of the individuals who usually serve on juries do not conduce more to the success of jury trial, than the general character and temper of the country in which that institution is established. It never has been supposed that trial by jury could at once be made to start up in perfection in any given state in compliance with the will of a sovereign or the wishes of its legislature; or even that it would be found to produce the same effect in every quarter where twelve unobjectionable jurymen could be assembled together. But though considerate men have never entertained such extravagant expectations, it will be found that greater preparation must be made for its introduction or extension among any particular people than has hitherto been anticipated. It not only requires time and experience, but the co-operation of other circumstances which it is rarely practicable either to create or controul. Jury trial will succeed in no countries where the inhabitants are rude, thoughtless, or unprincipled. They are not fit for it, and it is not fit for them. None but a virtuous and enlightened people with at least a moderate share of freedom, and settled principles of right and wrong, are prepared for its reception. Even in states possessed of these advantages, peculiarity of disposition or habits may cause recourse to be had to trial by jury, more frequently in one than in another. However valuable it always is, as a protection against injustice, there can be no doubt that it is either in struggles between the crown and the subject, or where damages are to

be assessed for injuries done to person or property, that its advantages are most eminently perceptible. In countries where causes of this kind are of rare occurrence, other questions of fact may safely be left to the determination of the ordinary judges. This has hitherto been the case in Scotland, and to that circumstance may be ascribed part of the repugnance or indifference to the application of trial by jury in civil causes, which seems still to prevail in that part of the kingdom.* But though all communities possessed of the qualifications which have been specified may not employ trial by jury with equal frequency, there are none else where the confidence and security which is afforded by this palladium against power and oppression can be fully perceived and appreciated. Even there, trial by jury cannot be maintained in perfection without uninterrupted and vigilant superintendence. Time is perpetually causing or disclosing defects or irregularities in its operation; and even at present, a few of these might be pointed out, which it would be desirable to check or correct whenever there is opportunity.

The first of these relates to the non-attendance of the greater part of those persons who are or ought to be summoned to serve as jurors. Every man possessed of the requisite qualifications is as much bound to serve his country in the jury-box as in the field, and the greater the number of its sub-

* Report of Commissioners on the Appellate Jurisdiction, Appendix, pp. 52. 88. 107. 151. 155. 175. 201. 208. 220. 238.

jects a state can train to both these sorts of discipline, its public and private rights will be the more protected and respected. So far is this jury duty from being generally performed at present, that either from imperfection in the way in which jurors are summoned or the facility with which leave of absence is granted, not one qualified person in fifty has even served the office. On the other hand a set of decayed tradesmen or unemployed persons of small property, procure a livelihood and amusement by being in perpetual readiness to undertake it in their stead. No specific mischief it is true has hitherto arisen from this irregularity, and it has even been contended that these professional jurymen answer the purpose better than those unpractised or reluctant individuals would have done for whom they have been substituted. If the fact be so, those who follow such a calling ought to be openly recognised by the legislature, and not permitted silently to subvert what has hitherto been considered to be one of the most important branches of our judicial procedure. But the opinion seems to be unfounded. How can it be expedient to throw the distribution of justice in common jury causes into the hands of comparatively mean men, when we find that whenever a cause of great public interest comes to be tried, these trading jurymen are constantly discarded and their place supplied by persons really drawn from the body of the people as according to the letter of the law, and spirit of our constitution they invariably ought to be? No harm and much benefit has always been supposed to re-

sult from the change. As far as experience therefore has gone, it concurs with the deductions of reason in recommending the adoption of more effectual means for compelling all persons to act as jurymen in their turn. It would also have some effect in softening the distinctions of rank, and connecting the different classes of society with one another in the accomplishment of a common object. This alone would be productive of good, which would be still further increased by the disclosure which the discussions which arise would necessarily produce of each other's real manners, habits, and opinions. What is of greater consequence perhaps than either, it would make multitudes of people, and especially those who live in large towns, more accurately acquainted with the nature of this part of our municipal policy than they ever were before. It may have formed the subject of their conversation, reading, or personal observation, but their notions respecting its nature and properties would have been greatly corrected and enlarged, if they had ever been themselves placed in a jury box, and obliged to assist in returning the verdict according to the evidence laid before them. I hope, therefore, that the bill for consolidating and amending the laws relative to jurors and juries, which was brought into the House of Commons in 1824, and now lies over for consideration, will be speedily passed into a law, and that the new provisions which it contains with respect to special jurors, will at no distant time be extended to jurors of every de-

scription, as they are well calculated to promote that regular attendance of qualified persons as jurymen which it seems so desirable to secure.

When the jurors have once been inclosed, they ought not in strictness to separate, either in civil or criminal causes, until their foreman has delivered their verdict to the judge, or to some other officer of the court who is in waiting to receive it. In civil causes which it has not been possible to finish at a single sitting, the jury have in a few instances been permitted by the judge to go to their own homes at night and return in the morning; and even coroners' inquests have since followed this example. Such indulgence ought to be sparingly granted, and it would perhaps have been wiser if the general rule had never been infringed. To permit jurymen to mix with the public, or to be placed in a situation in which an impression may be made upon their minds by any thing else than the evidence laid before them, may lead at last to serious practical inconvenience. The more rigorous their confinement is after they have once been sworn and inclosed, the more expeditiously the trial is likely to be brought to an end, and the greater will be the satisfaction afforded by their verdict.

The next thing to be noticed is *the form* in which the oath is administered. It is somewhat remarkable that the abstract doctrine of the law of England respecting the obligation of an oath, should have had so little influence on its own practice. The substance of that doctrine is,

that every man may be sworn who understands the nature of an oath and believes in a future state of rewards and punishments; and that he ought to be sworn, in that manner which has the most binding influence on his conscience. It was finally settled upon this foundation, in a case which underwent the most solemn discussion and determination,* and the reasons upon which the judgment proceeded cannot be read even at this day, without exciting the strongest admiration of the enlightened views and practical wisdom by which they were dictated. It might have been expected, that as it was in this country the essence of an oath was first clearly ascertained or judicially announced to consist *in its power to bind the conscience*, it would there have been administered in the manner, or with the solemnities, best calculated to fortify this binding obligation. This cannot now be said to be the case. It would be difficult to point out any state in which an oath ever was or is taken with so little ceremony as in England. Among the Jews, the same word which signifies *the right hand*, is said also to signify *an oath*; and we learn from different passages of scripture that their manner of taking an oath was by holding up the right hand, and swearing by the name of the Supreme Being. It is also clear that the form of oath used among the Greeks was the most impressive their lawgiver was capable of devising. Τρεῖς Θεοὺς ὁμνῦναι κελεύει Σόλων,

* 1 Atkins's Rep. 21.

Ικεσιον, Καθαρσιον, Εξακεστεριον,* says Pollux; and whatever difference of opinion may prevail respecting the precise meaning of these epithets, it is evident that they imply an appeal to God in those characters which are principally concerned in the administration of justice. The form of a solemn oath among the Romans was also well calculated to create attention. The person taking the oath held a flint stone in his right hand, pronouncing at the same time the following words: “Si sciens fallo, tum me Diespiter, salvâ urbe
 “arceque, bonis ejiciat, ut ego hunc lapidem.”†
 Though in some particulars the forms of oath adopted in the different kingdoms of Europe will be found to differ, in most of them there is a remarkable coincidence. In Roman Catholic states the rites of religion are usually called in to add force to the obligation. In other places again where oaths are few, an exhortation is sometimes addressed by the judge to those who are about to be sworn. And, as far as I know, in every country in Europe, whether Protestant or Catholic, except in England, the oath is administered by the judge to the person sworn, the person who takes the oath and the judge himself both standing, and both of them holding up their right hands while the words are repeated. In England none of these forms are observed. The touching of the holy Evangelists, which was substituted by Justinian‡ for one of a more impressive nature,§

* Pollux, lib. 8. c 12. † Festus, sub verbo *lapidem*.

‡ Novel 74. § Novel 12.

has ever since continued the principal ceremony in the administration of an oath. At present, when jurymen are sworn, an inferior officer of the court desires them to stand up by six at a time round a New Testament, and when each of them has taken hold of it with his right hand, the officer then pronounces aloud, "You swear that you will well and truly try the issue joined between the parties, and a true verdict give according to the evidence, so help you God;" or in the case of a witness, "You swear that you will tell the truth, the whole truth, and nothing but the truth, so help you God;" and as soon as each person has kissed the book, in his case the administration of the oath is ended. Neither judge, juror, nor witness, ever opens his lips. Nothing else is done by any other person, and even the few words which are uttered are often hurried over with blameable carelessness or precipitation. How far the form of oath now used might be improved, or whether in a country where so many oaths must be administered, it would be prudent to attempt its improvement, may not be easy to determine. That no form of oath can overawe the minds of hardened and unprincipled men is unquestionably true; as it also is that whatever the form of the oath may be, the deposition of a witness must be estimated principally by its intrinsic probability, consistency, and accordance with the rest of the oral and documentary evidence adduced. But as long as it is the object of an oath to bind the conscience, nothing by which the con-

science can be awakened or coerced ought prudently to be neglected. Were the juror or witness obliged to repeat the words of the oath after any other person, the very sound of his own voice would have some effect upon his mind, and make him feel himself more a real party in the transaction, and less like a mere spectator of a scene passing before him than he now does. This effect would be still more solemn if the oath were repeated by the witness or juryman after the judge. The judge also appears to be the proper person by whom the oath ought at all times to be administered. It is to him juries and witnesses principally look, and both on account of the influence he possesses over those who swear, and the reverence due to the name in which they are sworn, propriety requires that it should be dispensed by him as the individual present who is possessed of the highest rank and authority, and that he should not have the power of devolving this part of his duty upon any other person.

While all due attention ought to be paid to the manner in which oaths are administered, it is acknowledged by the best writers of every country that they should not be too much multiplied.* The number of them exacted by the law of England has been pushed to an extent which cannot be denied to be revolting. In preferring complaints before magistrates, giving bail, taking

* Stiernhoeck de Jure Sueonum, p. 115. Blackstone's Com.
*. iv. p. 137.

out patents, passing public accounts, accepting public offices, and in making voluntary affidavits, the multitude of them exceeds all belief. Scarcely an act of Parliament is passed in which new forms of affidavit are not prescribed, and even the simplest notice served on a party in a law-suit by any clerk in a solicitor or attorney's office, is not valid unless it is certified under a sanction no less cogent than if he were the sole witness against a prisoner tried for a capital offence. The consequence is, that excessive familiarity with oaths has destroyed, or essentially impaired that reverence which is due to their nature and obligation, and in half the instances in which they are required, they afford little security for the truth or correctness of what is spoken beyond that to which any deliberate statement gives, and perhaps not so much as would be due to that form of *solemn declaration* used in many parts of the Continent, which might often with so much advantage be substituted in their stead. In every point of view the form and administration of oaths deserves attention, and the more the subject is examined, the more generally will its importance be acknowledged. Government have, much to their honour, lately begun to diminish the number of oaths required in the customs and excise, and it is to be hoped their proposed alterations in this particular will not terminate until the necessity of every class which is exacted in any department of public or legal business has been satisfactorily established.

As it is the duty of the legislature on the one hand not to impose oaths unnecessarily, it seems to be the duty of every good subject on the other not to refuse to take them on any occasion when for the furtherance of justice or any other weighty reason the legislature has judged them to be requisite. The quakers were the first persons in this country who declined to take an oath, and by the 7 and 8 of William and Mary, c. 34, they were released from the penalties to which a refusal previously subjected them, and in civil causes the same effect is given to their solemn affirmation as to an oath taken in the usual form. In criminal causes their testimony continues to be rejected altogether. While all persecution for conscience sake ought anxiously to be avoided, it is at the same time true, that there should be no relaxation of the fundamental laws by which society is held together, except in a case of clear and paramount necessity. It may be doubted whether in this instance such necessity existed. It created an inconsistency in the law for which there does not seem to be sufficient foundation*; it was an exemption which it might have been foreseen would probably be claimed by others; and did not long satisfy the parties in whose favour the exemption was permitted. The form of the affirmation which quakers originally consented to give appears by the 7 and 8 of William and Mary, c. 34, to have run in the following terms: "I A. B. do declare in the pre-

* Phillips on Evidence, p. 26, 4th ed.

“ sence of Almighty God, the witness of the truth
“ of what I say.” When this form had been in
use between twenty and thirty years it was al-
tered by 8 G. I. c. 6. to the following: “ I A. B.
“ do solemnly, sincerely, and truly declare and
“ affirm.” Both of them are perhaps substan-
tially entitled to the denomination of oaths, but
the last much less than the first, and the transfor-
mation it has suffered shows the advantage which
is almost invariably taken of indulgence. Lord
Hardwicke observed in the instance of a quaker
lady, who made an application to him in the court
of Chancery, in a case where she hesitated at an
oath, which any suitor of another persuasion would
have been obliged to take: “ But as I have in-
“ stances in my hand where persons who called
“ themselves quakers, upon their affirmations be-
“ ing refused, have brought their consciences to
“ digest an oath, perhaps Mrs. Gumbleton, as
“ she goes in danger of her life, may dispense
“ with the strict rules of her sect, and may be
“ persuaded to swear likewise. If not, I will
“ consult the judges upon it.”* The same privi-
lege was given to the Moravians settled in our
North American colonies, by 22 Geo. II. c. 30.
Of late, other sects have sprung up professing the
same repugnance to oaths with the quakers and
Moravians. At the Cork assizes, one Connell, a
pawnbroker in that town, was fined 100*l.* by
Baron Pennefather, on the 16th of July, 1823, for

* 2 Atkins's Rep. 70.

refusing to be sworn. He admitted he was not a quaker, but said *he had scruples*, for the truth of which he appealed to the Rev. Dr. Guarry, by whom the statement was confirmed.* On the 5th of May, 1824, regular petitions were presented to the House of Lords by the Marquis of Lansdowne and Earl Gosford, from another body in Ireland called Separatists, praying that in all judicial cases they might be placed on the same footing with Moravians and quakers, and that their affirmation might have the full effect and validity of an oath. On the other hand, at one of the late trials for seditious and blasphemous publications, a witness, by making open avowal of atheism, escaped from becoming a witness against the prisoner altogether. What middle course then is the legislature to steer between those who have no conscience, and those who seem to have too much? The subject is one of extreme difficulty, and so deeply interests all those whose character or property may be affected by witnesses who appear before a judge or jury, that the principle by which the law is to be governed must soon be settled upon a wider and surer basis, than that upon which it now rests.

4. When the facts of a case have been ascertained by a jury, or are admitted in the pleadings without their intervention, it is then argued before the judges, who afterwards apply the law to the state of facts which is disclosed

* Courier newspaper of Aug. 21, copied from the Cork Constitution newspaper.

before them. Even though judgment has been pronounced, a variety of motions may still be made in arrest of judgment, according to the nature of the action, and the state of the pleadings; and it might be worth inquiry, whether it is not practicable to confine these motions within narrower limits than those which are prescribed to them.* On one occasion on which a motion was made in arrest of judgment, Lord Mansfield observed with that comprehensiveness and liberality by which his views of jurisprudence are generally distinguished: “It is much to be lamented, that in any sort of action, the mere inattention or slip of counsel, who are not always sufficiently attentive upon what count the verdict is taken, should be fatal to the party, contrary to the truth and justice of the case, the opinion of the judge upon the merits, who tried the cause, and the meaning of the jury who pronounced the verdict. However, in civil cases, the rule most certainly is settled, that where a verdict is taken *generally*, and any *one* count is bad, it vitiates the whole. It has always struck me, that the rule would have been much more proper to have said, that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad. In criminal cases the rule is so, and one cannot therefore but lament that the reverse is adopted in civil cases, because it is as

* Tidd's Practice, 3d ed. pp. 810—814. 1 Chitty on Pleading, p. 194.

“ it were *catching justice in a net of form.*”* . Whatever objections it may be thought proper to allow to the form of the action, or any particular part of the pleadings, ought to be presented in an earlier stage of the cause, as they can scarcely ever have any object after judgment has been pronounced, than to elude the ends of substantial justice.

5. Judgment being once pronounced, it only remains to be carried into execution; but in one instance, the manner in which that execution is effected, is particularly worthy of attention. It is one of the merciful provisions of the law of England, that a creditor cannot proceed at the same time both against the person and estate of his debtor, and if he chooses to proceed against the person at first, he cannot usually proceed against the estate afterwards. If he elects therefore to proceed against the person, and obtains a judgment for the debt, he may get the person of his debtor committed to the prison of the court in which the action was instituted, until the debt be paid. The prisons to which debtors are principally committed, are the King's Bench Prison, which is the prison of the court of King's Bench, and the Fleet Prison, which is the prison of the court of Common Pleas. It would naturally be supposed that the debtor is then actually consigned to the confinement and misery of a prison, that he may have every inducement to discharge the debt.

* Cowper's Reports, 276,

in order to regain his liberty. The law intended this to be the case. By the Common Law, a prisoner in execution was to be kept in *salva et arcta custodia*, till he satisfied the plaintiff. Now, however, upon the prisoner giving security to the marshal, he is allowed the benefit of what are called the *rules* of the King's Bench or Fleet prisons, or in other words, of living within any part of that circuit round the prison, and without its walls, to which its *rules* extend.* These *rules* are extended from time to time, as the judges of the King's Bench or Common Pleas see occasion;† and the space now comprised within the limits of the rules of the King's Bench prison, would of itself form a considerable town in any other part of the world, than in the neighbourhood of London. Respecting the *marshal* and the *rules*, the commissioners for inquiring into the duties, salaries, and emoluments, in courts of justice, in the report made to Parliament by them in 1818, on the Court of King's Bench, have thought proper to express themselves to the following effect: “The
 “ marshal's chief sources of profit at the present
 “ time, arise from the sale of porter and ale,
 “ (which item, they say, amounts to 900*l.* a year)
 “ and from the granting of the rules. It has been
 “ represented to us, that the annual consumption
 “ of porter and ale does not exceed the propor-
 “ tion of one quart per day to each prisoner

* Tidd's Practice, 3d ed. p. 946.

† 3 Term Reports, 583.—6 Term Reports, 305 and 778.

“ within the walls of the prison, and that the
“ liquors are of good quality, and sold at exactly
“ the same prices as at the public houses in the
“ metropolis, and so we think they ought to be.
“ The direct interest which the marshal has in the
“ sale of porter and ale, appears to us one of the
“ most effectual methods of enforcing the absolute
“ prohibition of spirituous liquors, which is a
“ standing regulation in the prison. We think
“ that this emolument ought not to be withdrawn
“ from the marshal, without an adequate compen-
“ sation. It appears to us that the sale of porter
“ and ale within the walls is upon the whole
“ convenient and beneficial to the prisoners. As
“ to the emolument of the marshal arising from
“ the granting of the rules to prisoners, it appears
“ to us necessary that a power of granting such
“ liberty should exist somewhere. The prison is
“ not capable of containing within its walls the
“ number of persons committed. The marshal,
“ who incurs all the risk of an escape, ought, we
“ think, in justice, to be indemnified in this re-
“ spect; and we do not see how he can be in-
“ demnified, without having the power of grant-
“ ing this indulgence upon reasonable terms, to
“ be made with the prisoner who seeks to avail
“ himself of it. The risk incurred must be sub-
“ ject to variation in each particular case, so as
“ to admit, as we think, of no general rule, which
“ could justly be applied as the measure of in-
“ demnity. Were the indulgence of the rules
“ withdrawn, or materially impeded, we should

“ have great apprehensions that the health of the
“ prisoners would suffer from the crowded state
“ of the gaol. It appears to us, that attempts to
“ alter the present practice might tend inconve-
“ niently to restrain, if not to destroy, the exercise
“ of the indulgence in question. Regulations have
“ recently been made in respect to this prison by
“ the authority of the Court itself, after a long
“ and painful inquiry, but no alteration is thereby
“ directed, as to the emoluments in question. It
“ appears to us, upon the whole, better to leave
“ this matter where the statute 32 Geo. II. c. 28.
“ has placed it; together with all matters condu-
“ cive to the better government of the prison, in
“ the hands of the court to which the prison
“ more immediately belongs.”* The commission-
ers have abstained from all observation relating
to the average number of debtors committed, or
the amount of their debts,—the number of those
who take the benefit of the rules, or the sums re-
ceived by the marshal for granting them;—all of
which particulars are extremely necessary to be
known, either in order to ascertain the exact
amount of the whole emoluments of the marshal,
which are said to be preposterously large, or what
is of much more importance, of the efficiency of
the present mode of confinement in the King’s
Bench prison, to enforce the payment of debts.
Whether it be wise policy for the law to permit
confinement of the person for the payment of

* p. 172.

debts, is a controverted question, which it is not necessary to stir in this place. Before resorting to that remedy, it would always be better to assign to the creditor the whole of the debtor's estate and effects present or prospective, as far as that course is practicable. Imprisonment might afterwards be enforced, if it were asked or permitted, but then it ought invariably to be imprisonment in the ordinary and strict acceptation of the term. If the prison, however large, be not large enough for its purpose, it either ought to be made larger, or it ought to be closed against debtors altogether. Imprisonment within the rules, can with no propriety be called imprisonment in any sense of the term. It is merely restriction to an unfrequented and disagreeable quarter of the town, where thousands of the most dissipated and worthless characters in the kingdom are congregated together, many of whom are known to be all the while laughing at their creditors and living in unrestrained debauchery and profusion. It often happens that the restraint does not even reach this amount, for it is notorious, that many of those who have been supposed to be within the rules, have been parading the streets of London, hunting in the country, or as is said to have happened in one or two instances, to have been actually travelling on the continent. The present system of confinement in the King's Bench prison labours under the further disadvantage of being both unjust and unequal. It is unequal, because those who are living without the walls,

cannot be pretended to be suffering the same restraint with those who are within, which as persons subject to the same misfortune, or guilty of the same offence, they are presumed to be. It is unjust, because in contradiction to every principle of natural equity, those persons are made to suffer most severely who the least deserve it. It is those who are too poor to procure or pay for the benefit of the rules, who are confined within the walls of the prison, and it is to those who have credit and can procure money, which had better be employed in discharging their debts, to whom that indulgence is extended. Unless stronger reasons can be urged in favour of such a system, than those which have been yet advanced, its continuance seems neither to conduce to the benefit of creditors, nor the good of the country.

SECTION V.

On the Procedure of Courts of Equity.

It has been already intimated, that the comparatively late period at which Courts of Equity arose, appears to be one of the chief reasons why the words and phrases used in equitable proceeding are more intelligible than those employed in

courts of Common Law. To the same circumstance it may be owing, that until a comparatively recent period, there was no necessity for its *written pleadings* being so rigidly confined to a precise form as those of the Common Law were very early required to be. It is true the multitude of technical rules which the subtlety of practice has now introduced has destroyed this simplicity, but the main principles of the system of equitable pleading are still entitled to decided commendation. A suit in equity is commenced by filing what is termed an *English Bill*, which when done in the name of the Attorney-General or with his sanction receives the name of an *Information*, and is addressed to the Lord High Chancellor if filed in the Court of Chancery, and to the Chancellor and Barons of the Exchequer if filed on the equity side of the Court of Exchequer; preserving always a similar form; setting forth the complainant's cause in any becoming form of words he may think fit to use; and praying that the defendant may be required by writ of subpœna to appear and answer it; and that the plaintiff may either have the relief he asks or such as the judge may think the justice of the case requires. The subpœna issues of course. The defendant is compelled by the subpœna to appear. When he has appeared, if he thinks he can show the Court that the bill, even though admitted to be true, ought not to be entertained, he *demurs* or *pleads*; but if he cannot admit the facts as stated in the bill, he delivers in a written answer upon oath, setting forth what

he knows or believes them to be. He has a right to a certain length of time in all cases to prepare this answer, and though in most instances it is believed to be at first too long, it is again extended whenever good ground is shown for such indulgence. Upon the allegations and prayer of the bill, the *demurrer*, *plea*, or *answer* of the defendant, together with the oral and documentary evidence produced by the parties, when such can be admitted, the decree pronounced in equity is founded. Though this is the form and progress of a suit in Courts of Equity at present, it was somewhat different when the jurisdiction of the Chancellor was established. The bill which forms the commencement of the suit, was not always in English, as has generally been supposed. The date of the first bills in Chancery now remaining on record, must be about 1394, in the 16th year of the reign of Richard II.* The bills were then uniformly in French, and the indorsement or order made by the Court, in Latin. The first English bill now existing in the Tower was in the early part of Henry V.† From that period bills appear to have been framed indifferently either in

* Proceedings in Chancery, p. 1. Though these very curious papers, prepared by authority of the Record Commissioners, are not yet published, I have, by the kindness of Mr. Bayley, been favoured with the perusal of that portion of them which is printed.

† Ib. p. 13.

English or French; and the last which is to be found in French, was in the early part of the reign of Henry VI.* As might have been expected at the rise of a new judicature, no nice or formal plan of proceeding was either pursued or required. From the cases of hardship stated however, and the fréquent complaints appearing in the printed papers, that the parties “were “poor, and unable to pursue the Common Law,”† and the manner in which they frequently addressed the Chancellor “for the love of God and “in the work of charity,” it is evident that they expected from his extensive power and summary method of administration, that redress which they could not obtain by any other means. While the Masters in Chancery, who are appointed by the chancellor, and attached to him as assistants,‡ appear to have been the principal agents in devising new *writs*, which multiply the forms of action and impede its progress in the courts of Common Law, no permission has ever been given to these officers to intermeddle with any part of the procedure under the chancellor’s equitable jurisdiction. The Court of Chancery has tenaciously adhered to that form of bill with which it began, and which it applies to all sorts of persons and causes of action. Indeed, it will

* Proceedings in Chancery, &c. p. 25.

† *Ib.* pp. 13, 14. 31, 32.

‡ 13 Edward I. c. 24. ante, p. 77.

not be easy to propose any plan of procedure more natural or appropriate than that of the court of Chancery, in essential points, now is. If it were disencumbered of that load of abuses and anomalies which time and carelessness have accumulated, it is well fitted by means of *pleadings*, *hearings before a judge*, *references by a judge to one of the Masters* for his opinion on subordinate matters, and *hearings on further directions* when it returns to the judge again, to settle the tedious and involved legal controversies, to which a refined state of society necessarily gives birth. Whether this be so or not, the records still extant prove that its motions were at first exempt from the charge either of dilatoriness or formality, and the fact is further confirmed by the celerity with which actions were terminated in the Courts of England in comparison of those of France.

In the dialogue which Chancellor Fortescue supposes to have passed between himself and Prince Edward, son of Henry VI., the prince proposes the following question: “Unum jam
“solum superest Cancellarie declarandum, quo
“parrumper adhuc fluctuat, inquietatur quoque
“mens mea; in quo si eam solidaveris, non amplius te quæstionibus fatigabo. Dilationes ingentes, ut asseritur, patiuntur leges Angliæ in
“processibus suis, plus quam leges aliarum nationum; quod petentibus, nedum juris sui prolatio est, sed et sumptuum quandoque importabile onus, et maxime in actionibus illis in quibus
“damna petentibus non redduntur.” To this

question the chancellor makes the following reply: "In actionibus personalibus extra urbes et villas mercatorias, ubi proceditur secundum consuetudines et libertates earundem, processus sunt ordinarii. Et quantaslibet dilationes patiuntur, non tamen excessivas. In urbibus vero et villis illis, potissimum cum urgens causa deponcat, celeris, ut in aliis mundi partibus fit processus; nec tamen ut alibi ipsi nimium aliquando festinantur, quo subsequitur partis læsio. Rursus in realibus actionibus. in omnibus fere mundi partibus, morosi sunt processus, sed in Anglia quodammodo celeriores. Sunt quippe in regno Franciæ, in curia ibidem summa quæ Curia Parliamenti vocitatur, processus quidam qui in ea plus quam 30 annis pependerunt. Et novi ego appellationis causam unam, quæ in curiâ illâ agitata fuit, jam per 10 annos suspensam fuisse, et adhuc verisimile non est eam infra annos 10 alios posse decidi. Ostendit et mihi dudum dum Parisiis morabar, hospes meus processum suum in scriptis, quem in Curia Parliamenti ibidem ipse tunc 8 annos pro 4*s.* redditus, qui de pecunia nostra 8*d.* non excedunt, prosecutus est, nec speravit se in 8 annis aliis iudicium inde obtenturum."* Yet so liable is every human institution to degenerate, that within a hundred years after this was written, the very same objections were made to the procedure of the Court of Chancery in England, which Fortescue has here made to those of the Parliament of Paris.

* Fortescue de Laudibus Leg. Angliæ, cap. 52.

The fall of Lord Chancellor Bacon was the first occasion which brought its delay and expensiveness fully into discussion, and the following notes, extracted from the Journals of the House of Commons, incontestibly prove that they were then felt to be a serious public grievance. “ Mr. Alford, “ —That the Chancery hindereth commerce at “ home.—The Chancery to be confined to breach “ of trust, covin, and accident ; not to have our “ wills or gift of lands questioned where no fraud. “ —Length of causes—23 his ; some 30 years.— “ That some masters of the Chancery good, “ others not so good.—19th April, 19 James I. “ —An act for review and reversal of decrees in “ courts of equity.—An act for avoiding of vexa- “ tion by process in courts of equity.—An act for “ prohibition for tithes.—An act for process of “ outlawry to be awarded after judgment in the “ King’s Bench.—An act for the avoiding of the “ exaction of undue fees in courts of justice.—An “ act for moderating of fees for orders in courts “ of equity.” In a subsequent debate Sir E. Coke declared, “ that the chancellor can make no de- “ puty for the merits of the cause, but accounts “ or matters of form.—That the Chancery em- “ braceth so many causes as the chancellor and “ master of the Rolls cannot possibly determine “ them. We —now about to restrain them.”* This parliament of James was dissolved before any of the regulations then in contemplation

* Journals of the House of Commons, v. 1. pp. 573. 582. 594.

were completed; and to judge of the practice of the court of Chancery by the language held respecting it, when the administration of justice came to be discussed during Cromwell's usurpation, it could not have improved in the course of the intervening period. An anonymous member of parliament, who published an account of the proceedings of the House of Commons, informs us that when the business of the high court of Chancery was taken into consideration in 1653, "in the course of the debate, the court of Chancery was called by some members the greatest grievance in the nation; others said, that for dilatoriness, chargeableness, and a faculty of bleeding the people in the purse-vein, even to their utter perishing and undoing, that court might compare with, if not surpass, any court in the world:—that no ship almost that sailed in the sea of the law, but first or last put into that port; and if they made any considerable stay there, they suffered so much loss, that the remedy was as bad as the disease;—that when the purses of the clients began to be empty, and their spirits a little cooled, then, by a reference to some gentleman in the country, the case so long depending at so great a charge came to be ended; so that some members did not stick to term the Chancery a mystery of wickedness and a standing cheat, so at the end of next day's debate it was voted down."*

* Hansard's Parliamentary History, v. 3. p. 1412.

In this state of the public mind, the ordinance of 1654 very naturally followed. The orders “for the government of the court of Chancery” were printed in 1656. The subsequent ordinance of 1664 was revoked in the same year, but by an order of the commissioners of the Great Seal, in 1657,* it appears that in practice every thing remained during the usurpation on the footing on which it had stood previous to the rebellion. Whitelocke has detailed the successive steps which were pursued on the occasion. In 1649, he reports that the commissioners met, and conferred together about making new rules for the reformation of Chancery. In 1653, he notices the vote of the House for taking away the Chancery, and that the committee of the law should bring in one act for that purpose, and another for the causes now depending and for future relief in equity. In 1654, a report was called for from the committee for regulating the Chancery; and in 1655, he states the objections made to the several parts of it, which, “though they could not prevail,” he says, “to stay the execution of it, as to us who seemed to doubt the power that made it, (which the makers would not endure,) yet we were the means that it was not exacted from our successors, but they were connived at in the execution of it, wherein they could not have satisfied themselves, having taken an oath which they scrupled would be broken, either in the ad-

* Beames’s Orders, p. 129.

“mittance of this ordinance for a bar, or if admitted,
“in neglecting any part of the performance there-
“of.”* Soon after the restoration Lord Clarendon republished the orders of 1656: Lord Bacon issued an useful set of orders during the short time he held the Seals, and his successors have done little more than add to and amend them. It is said that Lord Keeper North intended “to
“retrench motions for speeding and delaying
“causes; stopped the course of injunctions upon
“exceptions to an answer filed; retrenched the
“superfetation of interlocutory orders; very difficult about rehearings; quickened dispatch in
“the register’s office, and designed a book of
“rules and orders:”† yet this, like many other excellent undertakings, rested only in intention. It also appears that “The Lord Somers (in 1706,
“just after he had quitted the seals) made a motion in the House of Lords to correct some of
“the proceedings in the Common Law and in
“Chancery, that were both dilatory and very
“chargeable. He began the motion with some
“instances that were more conspicuous and gross,
“and he managed the matter so that both the
“Lord Keeper and judges concurred with him.
“A bill passed the House that began a reformation of proceedings at law, which as things now
“stand, are among the greatest grievances of the
“nation. When this went through the House of

* Whitelocke’s Memorials, pp. 421. 562. 608. 621.

† North’s Life of Lord Keeper North, 3d ed. v. ii. pp. 72. 88.

“ Commons, it was visible that the interest of
“ under officers, clerks, and attornies, whose pro-
“ fits were to be lessened by this bill, was more
“ considered than that of the nation itself. Seve-
“ ral clauses, however beneficial to the subject,
“ which touched their profit, were even left out
“ by the Commons. But what fault soever the
“ Lords might have found with these alterations,
“ yet to avoid all disputes with the Commons,
“ they agreed to their amendments.”*

A variety of subordinate and sometimes contradictory orders have been made from that time to this, yet from the institution of the court of Chancery to the present day, no part of the procedure of courts of equity has ever undergone serious or effectual revision. The consequence is, that the delay which takes place in the court of Chancery is proverbial, and the arrears of business have generally been enormous. To this there have been several rare exceptions. Lord Hardwicke is said generally to have discharged the whole equitable business which came before him; and once during the chancellorship of Lord Thurlow, he is said to have left town for the long vacation without leaving a single cause, motion, or petition, undisposed of. These exceptions appear rather to be honourable to the judges in whose time they occurred than as affording any proof of the general sufficiency of the present courts of equity to discharge the press of business which has for

* Burnet's History of His Own Times, v. iv. p. 140.

many years flowed in upon them. Their utter inability to accomplish this end, has on the contrary been a subject of private lamentation with almost every judge, who has for the last hundred and fifty years sat in Equity, and some of them have not scrupled to make a public avowal of their sentiments. Lord Kenyon declared about thirty years ago: "I admit the cause is unfinished. Is it therefore to be considered continually alive? I do not admit that: I fear many causes are in that situation, much to the reproach of the court and those concerned."* And not many months ago, Lord Chancellor Eldon is reported to have expressed himself in the following words; "The Lord Chancellor took this opportunity of observing upon the intricacy of legal pleadings. He recollected in former times these pleadings were extremely simple, but by modern practice they had been rendered most complicated. It had been thought advisable to assimilate the pleadings of Scotland, the length and intricacy of which had been much complained of, to those of England; but it appeared to him that the pleadings of this country were nearly as intricate as those of Scotland, and therefore little would be gained by their assimilation."† If the report now quoted be correct, this explicit though tardy acknowledgment of the deplorable state of the procedure of

* 2 Vesey, jun. Rep. p. 91.

† New Times, March 7th, and Morning Chronicle, March 8th, 1824.

that Court over which the judge who made it has now presided upwards of two and twenty years, and of which during the whole of that long period he has remained a constant and passive spectator, affords the strongest possible encouragement for persevering exertion on the part of those who think that the character of the law in this country and the interest of the suitors urgently require its amendment.—

Tu ne cede malis, sed contra audentior ito,
Qua tua te Fortuna sinet. Via prima salutis,
Quod minimè reris, Graja pandetur ab urbe.

To attempt an enumeration of the various proceedings which may take place in suits in Equity, according to the nature of the case and number of the parties, by means of *amendment* to original bills, *bills of revivor*, *supplemental bills*, *bills of revivor and supplement*, *cross bills*, *bills of review*, *supplemental answers*, and *exceptions to answers*, together with the interlocutory *motions*, and *petitions*, which in the progress of a suit may become necessary for preserving and managing property, preventing irreparable waste, stopping actions at Common Law, bringing fresh evidence before the Court, or other applications which the interest of individual parties or exigency of the case requires, would of itself form a task of no small difficulty. It may be sufficient to observe, that the operation of all this machinery, clogged and retarded as it is, produces a degree of delay and expense, which has rendered courts of equity an object of terror

to the suitors and of ridicule to the public. It is difficult to say whether dilatoriness or expense be productive of the most oppression. One great cause of expense has lately been removed by the partial reduction or total removal of the stamps on law proceedings. For this concession it is impossible to speak of the conduct of the government in terms of sufficiently warm approbation. The measure was not only a sensible relief in itself, but became doubly valuable on account of the feelings manifested on its enactment. It is to be hoped that the few law taxes which still remain will speedily be repealed also, and that none of those which have been abolished, will be under any circumstances re-established. A tax upon justice, next to the sale of indulgences, is the most odious and impolitic method ever devised to raise money on the people. With all the alleviations which are practicable, suits in equity can never fail to be costly. They must continue costly as long as they are dilatory, and they must of necessity be to a certain degree dilatory as long as they embrace a multitude of parties and varieties of interest. A suit in which there are five, ten or twenty parties, cannot possibly be terminated so quickly as an action at Common Law where the parties are few, nor does it seem practicable to introduce into it the same strictness of pleading without creating an expense which would become intolerable. To this circumstance those gentlemen in Scotland who have delivered their opinions on the improve-

ment of the procedure in that country, seem not to have sufficiently attended. Common Law and Equity is there administered in the same forum, and they appear to think that all law proceedings, equitable as well as legal, may be subjected to the same unbending technical rules which prevail in Courts of Common Law in England. An experiment of this kind seems scarcely fit to be attempted. Many of the suits which take place in equity are rather for the purpose of having the doubtful or complicated rights of several parties determined, than one specific equitable claim advanced on one side and denied on the other; and to nullify every step taken in such a process, when it has continued for years, and been with great trouble and expense brought nearly to a termination, merely because it suited one out of many parties to take a technical objection, would entail extreme oppression upon the great body both of plaintiffs and defendants. Should there be any justice in the observations now offered, pleadings in equity must always remain less technical than pleadings at Common Law between two parties only. I conceive this distinction between the two systems to subsist to a certain degree at present in England, and it does not seem practicable altogether to remove it. But while it is unadvisable to expect or attempt too much, there can be no doubt that in almost every stage of equitable process great improvements may be with certainty effected; and as after all insurmountable causes of delay will still remain, that very circumstance

furnishes the strongest possible argument why none which can be surmounted should continue.

Delays in Courts of Equity, as well as in Courts of any other description, may arise from four different and unconnected causes, from the judge, from counsel, from solicitors, or from that body of regulations of which what is called the practice of the court consists. It falls to the lot of few judges to hit the exact medium between slowness and precipitation. Great allowances ought to be made for the differences which must exist in their powers and dispositions. There are however certain limits which a judge cannot transgress without degenerating into extremes which the general sense of mankind will pronounce to be reprehensible. In the course of a debate on Unitarian marriages which took place in the House of Lords in 1824, Lord Eldon is reported to have expressed himself thus: "But what it was that made these marriages valid before the passing of the act, although he had been occupied eighteen days in hearing arguments and authorities on both sides in a case involving a question of legitimacy, arising out of the effect of a marriage of that description of law, he did not know how to decide; and he believed their lordships would rather endure the tortures of the inquisition than be condemned to hear the arguments which he had been obliged to listen to on the subject."* Unless the words or sentiments of

* New Times of May 5th, 1824.

Lord Eldon have been misreported, the speech here ascribed to him is one of the severest censures ever pronounced upon his own judicial administration. Taking for granted the reality of the torture which the judge here assumes himself to have suffered, it is impossible that he should not in part have become his own tormentor. Allowing the utmost latitude for patience and attention, eighteen days is surely an extravagant space of time for a single cause to occupy ; and I do not see how it is possible to deny that before this could happen, a judge must be in some way or other deficient in the decision and energy which belongs to his station, and answerable for a considerable share of the delay which he affects to deplore. North said of Lord Nottingham, that he came into the Court of Chancery “ and sat there a great many years. “ During his time the business, I cannot say the “ justice, of the Court flourished exceedingly. “ For he was a formalist, and took great pleasure “ in hearing and deciding, and gave way to all “ kinds of motions the counsel would offer : sup- “ posing that if he split a hair, and with his gold “ scales determined reasonably on one side, jus- “ tice was nicely done. Not imagining what “ torment the people endured who were drawn “ from the law, and there tossed in a blanket.”* An appetite for arguments of counsel, which it is not uncommon for judges to acquire, is a source

* North's Life of Lord Keeper North, v. ii. p. 74, 2d ed.

of severe oppression to litigants, and is not unfrequently pushed to such an extent, that justice expires under the precautions which are taken to preserve it. Whether counsel ought in certain cases to be interrupted by the bench, or whether the most effectual sort of interruption does not consist in the distress which an attentive judge will generally be seen to suffer from wandering and repetition, are points which it is not very easy to determine. Lord Hale, whose judicial qualifications none will be found to question, appears to have regarded seasonable interruption as a part of his duty; “And when he was a judge he held those “that pleaded before him to be the main hinge “of the business, and cut them short when they “made excursions about circumstances of no “moment, by which he saved much time, and “made the chief difficulties be well stated and “clearly.”* Even without attempting interruption at all, a temperate and firm judge must from his manner of conducting business alone, check the length and diffuseness of the arguments of counsel in a way which they will find it difficult to resist. Irregularity, or bad arrangement in his mode of proceeding, is also an error into which a judge may fall, and one of the most fruitful sources of delay existing. It may exist in all degrees, and be pushed so far that a considerable portion of each day may be exhausted in talking over what was done on some day pre-

* Burnet's Life of Sir Matthew Hale, p. 125.

ceding, or is to be done on some day following. Few restraints upon unnecessary delay in the despatch of business would be more effectual than to limit the number of counsel who are permitted to address the Court. Instead of hearing three or four on one side, as often happens now in Courts of Equity, much time would be gained by restricting them to two, which is the number allowed to be heard in the House of Lords, and ought to be sufficient to explain the merits of any question. There would thus be a considerable saving of time in the number of speeches, and as those who spoke would come better prepared, there would probably be a saving of time in the length of each speech also. The courtesy which solicitors show to each other, or the remissness with which they act themselves, is a considerable cause of procrastination also. Part of it is said to be attributable to the clerks in court—a class of officers who still exist in the courts of Chancery and Exchequer, and are formerly said to have existed in the King's Bench also, though they have in that court been long ago abolished. They are the only attornies recognised in courts of Equity, and are in theory supposed to have the management of all the suits there depending. “The first step in a suit,” Mr. Vizard has said, “compels the solicitor to go to a clerk in court; nor can he make a single move afterwards, without this, as it appears to me, most useless officer.”* To this one of the clerks in court has

* Vizard's Letter to Master Courtenay, p. 4, 11, and 34.

made the following reply : “ Mr. Vizard states *that*
“ *he cannot discern that the clerks in court are useful*
“ *in assisting or controuling the solicitors, or in pro-*
“ *tecting the Court ;* now I can with safety say,
“ that almost every minute of my time and that of
“ my brother clerks in Court, who from their long
“ standing in the office have any considerable
“ portion of business, that is to say, the time that
“ can be spared from our attendance to the duties
“ of our office, is taken up in answering the
“ various questions of practice put to us by our
“ clients and their clerks ; and I assert that the
“ expence and delay saved to the suitors by the
“ timely application of the solicitors to their
“ clerks in court is incalculable.—On the charge
“ of delay, I at once deny that any is imputable
“ to our office. The present constitution of that
“ Court admits of great delay in the practice,
“ and the negligence of the suitors tends to in-
“ crease it. On this subject I will say no more.
“ The commissioners in the discharge of their
“ duties cannot fail of being convinced, that whe-
“ ther the proceedings pass through the six clerks’
“ office, or through the offices of individuals, al-
“ terations in the practice, and the honest atten-
“ tion of the solicitors to the interest of their
“ clients, can alone obviate the evils that are now
“ complained of.”* The only conclusion which can
with certainty be drawn from these conflicting
statements is, that every suitor in the Court of

* Mills’s Letter to Master Courtenay, p. 6 and 10.

Chancery is obliged to have two solicitors in the same cause, the first of whom charges the second with delay and expence, and the second charges the first with inattention—neither of the charges being perhaps altogether without foundation. But what possible reason can be given why two agents in this case should be better than one? First of all the cost is greater, and that is an obvious disadvantage. In the next place, it must naturally take more time to communicate through two than through one, which is another disadvantage of no small moment. Last of all, if blame is imputable, it is much more difficult to fix it upon two than one, and that is also disadvantageous. Upon every ground, therefore, one agent appears to be preferable to two; and if so, there can be no doubt that the client's own solicitor ought to be preferred, and the clerks in court superseded. Whatever duties it is desirable that the sixty clerks, or the clerks in court in Exchequer, should still continue to perform in preserving and arranging records, reading proceedings in Court, taking charge of the written pleadings during the progress of a suit, or making copies of them for the benefit of the suitors, should be remunerated as liberally as the nature of their occupation warrants. But there is no reason why an attempt should be made to elevate their station into one of dignity or large emolument, or that they themselves should be recognised as the official attornies of the Court. The client's solicitor would then

be exclusively responsible for the management of the suit. If it were conducted well, he would receive the credit, and if not, he would be obliged to bear the blame. It also happens that the remissness of the plaintiff's solicitor is often heavily complained of by the solicitors for the different defendants, and it is one of those causes of delay which should most anxiously be guarded against. There are two courses, which courts of Equity in these circumstances may adopt, according to the nature of the case. It may either give the conduct of the suit to the solicitor for one of the defendants, or to a solicitor of its own nomination. If it can be given with propriety to the solicitor of one of the defendants, that course as the mildest usually receives the preference. When this cannot be done, the Court then exercises its unquestionable privilege of taking the management of the suit entirely out of the hands of the party's own solicitor, and commits it to one of its own appointment. This part of its jurisdiction is so peculiarly delicate, that it is not desirable it should be often exerted, although if it were exerted somewhat more frequently than it has been, it would be one of the most efficient of all means by which the speed of suits in Equity would be accelerated.

The three grounds of delay which have now been specified, are neither caused nor cured by rules or resolutions, and have no necessary connection with the badness or excellence of the

system of procedure itself. The system of procedure may on the one hand be excellent, while the prevalence of one or more of these causes of delay may render the wisdom of its provisions almost totally useless; and, on the other, the capacity and activity of judges, counsel, and solicitors, may carry on business well, while the system of procedure itself is obviously faulty. In general, however, the one has an effect upon the other, and the zeal of both judges and practitioners is apt to be slackened, when they find that the system of procedure affords opportunities for delay or chicanery, which, with all their efforts, they are unable to counteract. The great length of time which is allowed to every step in the cause, is the chief defect of the system of procedure in Equity. Though the communication between different parts of the country is twice as quick as it was fifty or a hundred years ago, that circumstance has not in the least accelerated the movements of courts of Equity, and the space that elapses between term and term, is regarded as time during which the Court and its practitioners do nothing. Every thing bears marks of the formality and inactivity which characterise the legal institutions of an antecedent age, and powerfully militates against those who are anxious to get a speedy decision on the real merits of the questions at issue between them and their opponents. Besides this general imperfection which pervades the whole system, there are a variety of objections which may be made to its particular parts,

..

a few of which by way of illustration shall be now specified.

1. The first of these is the form of the bill and answer. A bill consists of nine parts; 1, the title of the judge or judges of the Court to whom it is addressed; 2, the names of the plaintiffs and defendants; 3, the statement of the complaint itself; 4, the charge of confederacy; 5, that part of the bill called the charging part, in which the presumed justification of the defendants is set forth and repelled; 6, the interrogating part; 7, the averment, which is intended to give the Court jurisdiction; 8, the prayer for that discovery or relief which the plaintiff thinks fit to ask; and 9, the prayer for a subpœna.

Inconvenient as the form of a bill in Equity is, the introduction of any material amendment will by no means be found so easy an undertaking as might at first sight be imagined. The charge of *confederacy*, and the averment which is intended to give the Court jurisdiction, ought both of them to be omitted. The first was introduced by the plaintiff in order to ascertain whether the defendant was in league with any other persons, and particularly with great men, who in former times frequently maintained quarrels for the purpose of oppressing their inferiors; and the second was intended at the commencement of equitable jurisdiction, as an appeal to the Chancellor's compassion, upon any ground which the plaintiff might think fit to mention.* This change, however,

* On these points see Proceedings in Chancery, printed by the commissioners of records, p. 1—56 passim.

even if effected, would be very unimportant. Another alteration might be suggested, which, if practicable, might perhaps be of more utility. If the names of plaintiffs and defendants were prefixed to a bill in the same way that they are to an answer, and if the statement of the plaintiff's case were put into the shape in which the substance of it is afterwards embodied by solicitors in the briefs which are delivered to counsel when the cause comes into Court, or thrown into a form still more abstract, the allegations which appear in the *charging part* of the bill might perhaps be introduced into the *stating part*, by which means that which is now technically termed the *charging part* might be superseded altogether. As the bill is now framed this could not be done. The running form of the statement now in use, incumbered as it is by "Your orators and oratrixes, further showing unto your Lordship," does not easily allow allegations to be made and rebutted at the same moment; and however awkward the *charging part* may at first be thought, those who draw bills in Equity usually have recourse to it on account of the facility it affords of setting forth such facts as could not conveniently be introduced elsewhere. It is extremely awkward however, to be obliged to search for the statement of facts in different and distinct parts of the bill, and if the *stating* and *charging* parts of a bill could be united, by altering the *stating part* either as here proposed or in any other manner, it would at once simplify the form of the bill, and prevent a great deal of tau-

tology, which the repetition of the same matter in the *stating* and *charging* parts of the bill occasions, and is one of the main causes of the excessive length of Equity pleading, for which practitioners were at one time severely punished. “ By a late “ order taken in Easter term, 38 Elizabeth, no bills “ ought to be of needless length on pain to have “ a fine set upon the counsel, with some penalty “ also to the plaintiff, and the like order standeth “ also for answers, replications, and rejoinders.”* This order was very reasonable if it could have been carried into execution. But it could not. The ways in which different counsel view the same case are as various as the modes they will adopt to put that view into words, and unless the needless length has been excessive there seems no way of relieving the party who has been unjustly vexed by long-winded pleading, than by taking it into consideration in the taxation of costs. In the *interrogating part* of the bill those facts which have been already set forth in the *stating*, and perhaps repeated in the *charging* part of the bill, are again detailed in the shape of questions to which the defendant is required to answer. This part of the bill has also frequently been supposed to be superfluous. Tiresome as it is, it is difficult to see how it could be spared. If there were only one way of interrogating to questions, and those questions were broken down into distinct divisions, the defendant could answer

* MS. in the possession of Henry Maddock, Esq. p. 85.

them as easily without the interrogating part of the bill as with it. But the interrogating part of a bill is, or ought to be, as various as the questions which are put upon a *vivâ voce* examination of the witness. In many instances a bill may be sufficient without an interrogating part at all, and in others, upon the minute accuracy with which the interrogating part is framed, the whole benefit which is expected from it necessarily depends. If the interrogating part were omitted, one of two consequences would necessarily follow. Either half the defendants in Equity would be compelled to answer too much, or the other half would answer too little, and both of these inconveniences would be more generally prejudicial to suitors in Equity, than by continuing the interrogating part of the bill on the footing on which it at present stands. The last part of the bill is the prayer either for *discovery* or *relief*, or for both;—and perhaps too much nicety is now required in its preparation. The leaning at present is towards the side of liberality, but there would be no harm if a little more latitude were permitted.* It is a well known observation that the prayer “for general relief” is the next best prayer to the Lord’s prayer, and in the case of a charity no other is requisite. It will not be easy to give a sound reason why a charity should not be put on the same level with other parties. How that would best be done may

* One of the last discussions on the subject occurs 12 Vesey’s Rep. p. 62.

be questioned, and perhaps it would be more desirably effected by putting all suitors upon the same footing with charities, than by depriving charities of any privileges which they now enjoy. The only protection to which a defendant is entitled is, that the plaintiff should be allowed to ask no relief or discovery at the bar, which is essentially different in kind from that which is prayed in the bill. This is necessary in order that the defendant may not be taken by surprise; but with this reservation there seems no reason why the judge should not give whatever relief or discovery the justice of the case as proved at the hearing seems to him to warrant.

Whatever difficulty may be experienced in proposing any thing advisable in the form of the *bill* now used in Equity, that of the *answer* seems susceptible of decided amelioration. Various alterations might be pointed out, by which it might be diminished in length and increased in clearness. If the *interrogating* part of a bill were divided into separate portions and a number affixed to each, as is often done by the defendant's solicitor for the convenience of preparing instructions for the answer which is to be drawn by the barrister, the instructions for the answer might with very little trouble be converted into the answer itself. The whole questions contained under those numbers which the defendants did not deny, might then be at once admitted, either absolutely, or with such limitations and explanations as the facts rendered necessary. Each of the remaining interrogatories

might then be answered directly and succinctly, and the monosyllables *yes* and *no* would be a more distinct mode of expressing the assent or denial of a defendant, than all the circumlocution which is now employed. If questions be repeatedly asked, the same in substance, but with some unimportant alterations in form, the defendant would have nothing to do but to refer to the number of his first answer, which might easily be prepared so as to satisfy all the interrogator's variations. The answer of defendants would then be prepared with greater facility either by counsel or solicitors, the defendant would himself understand more distinctly that to which he was about to swear, and his answer when sworn would be more intelligible to the judge, counsel, and parties, and also less costly by being reduced to a third or fourth of its present magnitude. I perceive no solid objection to this or some equivalent alteration. The answer of a defendant is as truly an answer to a series of interrogatories, as the answer of a witness is to the list of interrogatories which is put to him; and there is no reason why the interrogatories of a plaintiff and answers of a defendant should not assume the same form with interrogatories and answers of any other description. The form here proposed to be given to answers, would at the same time more nearly approach to the form in which the defendant's answers were originally given. When Courts of Equity first assumed jurisdiction, a defendant did not put in a cunningly prepared answer in writing as he does now. The

personal attendance of defendants in Court, which is still required, though it serves no other purpose than to mislead a few ignorant parties, was at first regularly exacted, and they were orally examined by the chancellor, on the subject of the bill filed against them. Written answers did not come into use till the 20th of Henry VI., in the first of which remaining on record the defendant concludes, "Thees be the answers of Edmond Sterky to the bill suyde ageyne hym in the Chancery be Thomas Arkeden, vicary of the chirche of Wolferchiston,"* and even then *viva voce* examination was by no means discontinued.† To how late a date oral answers can be traced I have not been able to ascertain; but down to the end of the reign of Henry VI. which is the latest period to which the printed proceedings in Chancery reach, it appears that answers were taken much more frequently in that manner than prepared in writing. The form of the answer which has here been suggested, would therefore only be an approximation to that oral examination to which in former times the courts of Chancery always had recourse, and which it is surprising that it ever should have totally abandoned.

2. When a bill has been filed, the next material stage of the suit consists in the appearance of the defendant.—A defendant is required to appear

* Proceedings in Chancery, printed by authority of the record commissioners, p. 1, 17, 31, 41.

† *Ib.* p. 30, 31.

by delivering or showing to him the following writ of subpœna; “George the Fourth, by the
 “Grace of God, of the United Kingdom of Great
 “Britain and Ireland, King, defender of the faith,
 “&c. To A. B., C. D., and E. F., greeting.
 “For certain cases offered before us in Chancery,
 “we command and strictly injoin you, that lay-
 “ing all other matter aside, and notwithstanding
 “any other excuse, you personally appear before
 “us in our said Chancery, the —— day of ——
 “wheresoever it shall then be, to answer con-
 “cerning those things which shall be then and
 “there objected to you, and to do farther and re-
 “ceive what our said Court shall have considered
 “in this behalf; and this you may in nowise omit
 “under the penalty of one hundred pounds; and
 “have there this writ. Witness ourself at West-
 “minster, the —— day of —— in the —— year
 “of our reign.”* This is the whole of the sub-
 pœna. On the back is indorsed “At the suit
 “of A. B.,” and the body and indorsement taken
 together, afford all the information which the
 Court is pleased to give to a defendant of what
 he is bound to do when a suit is commenced
 against him. It is at once redundant, deceptive,
 and insufficient. It is redundant because the
 words “*wheresoever it shall then be*,” if they do not
 lead to ambiguity, are at least superfluous. If the
 Court of Chancery ever exercised its ordinary
 jurisdiction any where else than in London, such

* Harrison's Practice by Newland, p. 97.

a circumstance has not for centuries occurred, and London therefore ought to be the place to which the defendant should be required to resort. The penalty of one hundred pounds had better be omitted also, and some more suitable compulsitor substituted in its room. Considered as an alternative, it is as much too high in some instances, as it is too low in others. But it never is in fact levied, and it answers no good purpose to hold out a threat which it is never meant to enforce. It is deceptive, because it asks him "personally to appear before us in our Chancery," when such appearance is in reality neither expected nor permitted. It is also insufficient at the same time, because while it requires that which has not for centuries been done except nominally, it omits to tell him plainly and distinctly what he ought to do. Even by the help of the indorsement, it is only by indirect inference the person upon whom it is served can discover that he is made a defendant in a suit in Equity at all, and it does not tell him one word about preparing that written defence or answer which he is really obliged to make to the bill filed against him.

It may be alleged that the objections which have now been urged, are founded upon mere speculative refinement; that the present form of subpœna has been in use for centuries, and that though its form may not be absolutely unexceptionable, yet that it sufficiently fulfils its purpose, without any practical inconvenience being felt from it, or serious complaint having ever been preferred against it.

It is not quite true that the present form of the subpœna has been productive of no practical inconvenience. It has repeatedly happened that poor persons, in distant parts of the country, have with much loss and trouble hurried up to London on the receipt of a subpœna, or been imprisoned for neglecting it; and as it is a doctrine of the Court “that it is a sufficient ground for protecting a defendant from a suit, that he *may be vexed by it, independent of any pecuniary consideration* ;”^{*} a suitor has as just a claim to be protected against vexation in this instance as in any other. But even if no inconvenience had been sustained, the present form of the subpœna ought not to be continued. All the change that is requisite might be effected with the utmost ease, and without hazard, and if it should be contended that forms which were made to suit the law as it existed three or four centuries ago do not require to be accommodated to the present times, and that it is just to employ legal instruments which say one thing and mean another, then there is no species of absurdity and deceit which may not be justified, and Courts of Equity will themselves become the promoters of fraud and misrepresentation, which it constitutes the most legitimate branch of their jurisdiction to suppress.

Supposing, however, the meaning of a subpœna to be understood, and that the party on whom it is served has been informed that the object of it is

^{*} Lord Dursley v. Fitzhardinge, 6 Ves. 251.

to obtain his answer, the rules by which the procedure of the Court is guided, offer little encouragement to a defendant to prepare it expeditiously, and show too much indulgence to those defendants who are negligent, obstinate, and refractory. If a defendant delays or refuses to appear, the plaintiff is obliged, first of all to sue out *an attachment*, then *an attachment with proclamations*, then a *commission of rebellion*, then a *serjeant at arms*, and last of all a *sequestration*; as well as to endure the whole expense and delay which these cumbrous proceedings occasion. What is still more strange, a plaintiff must go through every step of this tiresome round, before he can compel the defendant to yield obedience to a decree which the Court has regularly pronounced.* “About fourteen or fifteen years ago,” says Lord C. Baron Gilbert, “they began to shorten the process in execution of the decree, for if they must begin with the *attachment, proclamation, commission of rebellion*, and spend all the process, it would be a year’s time before all the process could be executed so as the plaintiff could have any effect of his suit; and therefore they proceeded to serve the defendant with a copy of the decree, and upon an affidavit of service and refusal to obey the decree, they moved that he might stand committed; and the practice then was, immediately to commit him to the Fleet, and upon a return of *non est inventus* by the

* Harrison’s Practice, p. 333.

“ warden of the Fleet, the Court ordered a sequestration ; but that was complained of by the serjeant at arms, and on the third day of May, in the 7th of King George the First, an order was made that there should be no sequestration, but upon return of the *non est inventus* by the serjeant at arms. This shortening of the process was justified by the antient practice of the Court.”* A practitioner of the Court at the same time, loudly complained of “ the great number of processes before you can come to a sequestration, and the many niceties in suing and returning them, which frequently is judged irregular, and the plaintiff pays costs for it, and is obliged to begin again.†”

Though it is near a century since Gilbert wrote, that part of the procedure by which Courts of Equity compel obedience to their orders, and of which he so highly disapproved, still maintains its ground though its defects are so extremely glaring. It is dilatory, circuitous, expensive, and unnecessary. The two first of these qualities will not be disputed. The third unavoidably follows from the other two, and the charges become particularly heavy when any application is required to be made to the serjeant at arms. This officer is not remarkably qualified for the performance of some

* Gilbert's *Forum Romanum*, p. 84. See also *Ex parte Jephson*, *Preced. in Chancery*, p. 550.

† Proposals offered to Parliament for remedying the great Charge and Delay of Suits at Law and in Equity, by an Attorney. London, 1725.

of the duties which devolve upon him, but if he must continue to discharge them, it ought to be under well-known and specific rules and regulations. To none such is he now obliged to conform. His fees are complained of as excessive, and are said to be nearly arbitrary. The whole circle of procedure which has been specified is also shown to be unnecessary, because it is not invariably followed. In the case of a peer or member of the House of Commons, a *sequestration nisi* is at once obtained,* by which means the whole of the four first steps commonly taken are avoided; and the process then begins at that precise stage where it on ordinary occasions ends. No reason can be assigned why in this particular, there should be any distinction between members of Parliament and other suitors. If indulgence is to be shown, members of Parliament are as well entitled to it as any other persons, and as it is not extended to them, it is a strong reason for believing that it need not exist at all. To shorten the process by which a defendant is compelled to appear or perform what the court has ordered, is one of the most obvious, simple and effectual methods of checking the delays with which courts of equity are chargeable.

3. At the same time that all parties really necessary to a suit should be compelled to yield a ready and unreserved obedience to the mandates of the court, every precaution should be

* Wyatt's Register, 387.

taken that no cause should be stopped by the absence of any parties who are in reality superfluous. Few things retard business in courts of equity more than the multitude of parties whose presence is now deemed essential. The object of courts of equity is to make a complete decree between all the parties who have any present or future interest in the matters in question, and for this purpose it requires every individual among them to be represented, so that none may be affected who are unheard or undefended. Laudable as this end must be admitted to be, it is exceedingly questionable whether it does not create a great deal more hardship than it prevents. In many instances it is impracticable to produce strict legal evidence that all the parties who may be affected by a decree are before the court, and in most cases which occur, the property in question would be exhausted before the inquiries were ended. Take voluntary societies as an example. Many of these consist of several hundred members, and to insist on an answer from each before the point in dispute is heard, which the strict practice of the court requires, is to rear up a barrier between litigants and justice, which if they are poor they are unable, and if rich they will not take the trouble to surmount. Even in a common suit, where the parties are numerous, there are so many births, deaths, and marriages, that bills of amendment, revivor, and supplement are endless, and travelling has become so common, that it is no easy matter to

ascertain how many of them are even within the proper jurisdiction of the court. Lord Kenyon, when Master of the Rolls, actually assigned the number of parties as a reason why he did not delay a cause for further consideration before he gave his judgment, which he would otherwise have been inclined to do.* And in the same volume it is mentioned “that a case occurred this morning at the Rolls, where a man, after mortgaging his estate, died, having left all his property by will to his wife and children, who were eight in number. The mortgagee filed a bill to foreclose, and one of the children being abroad, his honour refused to send it to an account;”† upon which circumstance Lord Redesdale, in his Treatise on Pleading, makes the following remarks: “A suit may affect the rights of persons out of the jurisdiction of the court, and consequently not compellable to appear in it. If they cannot be prevailed upon to make defence to the bill, yet if there are other parties, the court will sometimes proceed against those parties; and if the absent parties are merely passive objects of the judgment of the court, or their rights are incidental to those of parties before the court, a complete determination may be obtained; but if the absent parties are to be active in the performance of a decree, or if they have rights wholly distinct from those

* *Leslie v. Devonshire*, 2 Br. 201. 1 Ves. 523.

† 2 Brown's Rep. 277.

“ of the other parties, the court cannot proceed
“ to a determination against them. Hence there
“ sometimes arises an absolute defect of justice,
“ which seems to require the interposition of the
“ legislature.”*

Near forty years have passed away since these observations were first published, but as in other instances of severe and silent suffering, the legislature has afforded no relief. It is true the courts of equity are more liberal than they were when Lord Redesdale wrote, but even now they neither do, nor at their own pleasure ought to be allowed to give the whole of that relief to which suitors are entitled. Scarcely an entire sitting of any court of equity passes over, especially on those occasions where incidental applications in the latter stages of a cause are most frequently made, where the judge is not forced to act in opposition to established forms, merely in order to prevent the whole fund in court from being exhausted by the costs which the ordinary routine of practice would occasion. This alone proves some remedy to be required, and that which the late Sir William Evans has proposed is the following: “That at a certain time after return of process,
“ a decree absolute or conditional, upon affidavit
“ or otherwise, should be made in the same manner as if the parties had appeared or answered,
“ and that the court should proceed without
“ parties who are dead or without the jurisdic-

* Lord Redesdale on Pleading, 2d ed. p. 30.

“tion, and that it should be lawful for the court
“in its discretion, and after such inquiry and
“investigation, to proceed as it should think
“meet.”* Considerable benefit would flow from
the adoption of this proposal, but it would still be
inadequate. Many parties might be dispensed
with altogether, as a sufficient number of persons
may be already before the court to support the
interest in which they claim, and others though
necessary would be contented with a nominal
appearance, without taking any share in the con-
duct of the cause, and would cheerfully acquiesce
in any decree the court might think itself war-
ranted to make. To whatever extent the pre-
sent rules of courts of equity with regard to
parties ought to be relaxed, some relaxation of
them would be eminently beneficial. Courts of
equity endeavour to give a degree of perfection
and completeness to their decrees which human
affairs do not admit. It is either impossible to
make a final decree between all parties and upon
all points connected with a ramified equitable suit,
or it is made with such loss of time, money and
anxiety as it is painful to contemplate. Under
every aspect in which it presents itself, the *parties*
which are held to be necessary to a suit, is a very
important part of the law of every country, and
one of the branches of procedure in our courts of
equity which seems to stand peculiarly in need
of examination and amendment.

* Evans's Statutes, vol. 7. p.

4. When the necessary parties have appeared and put in their answers to the bill, it then becomes incumbent upon plaintiffs and defendants to determine whether any oral or documentary evidence be necessary, together with the best method of obtaining it.

With respect to *documentary evidence*, some of the parties often suffer great hardship from being compelled to prove facts which their opponents do not seriously doubt, but as they possess a right to have them proved, they avail themselves of it in order to reap all the advantages which delay and accident may give them. Take for instance the case of a will, where real and personal estate is made liable for the payment of debts and legacies. Supposing the will to have been proved in Doctors Commons for the purpose of granting administration of the personal estate, should any question arise with respect to the real property in the court of Chancery, the heir may compel any of the legatees to prove the will, and for that purpose, either to prove the death of the witnesses, or to search for them all over the world, and to be at great expense in bringing them to London when found, or in suing out a commission to have their examination taken either abroad or in England. The practice now mentioned encourages this fruitless investigation and controversy, and the soundness of the principle on which it is founded may be much questioned. It seems to accord better with the ordinary methods of transacting business and the dictates of

natural equity, to give the opposite party sufficient time and convenient opportunity to inspect every original or exemplified instrument which may be produced, and that it should then be received as genuine, unless its genuineness be disputed. If it is disputed, it is but reasonable that the whole costs, which are thus caused, should abide the result of the inquiry. No instrument would then be produced or impeached unless for substantial reasons, and parties would hesitate before they wantonly incurred an expense, of which they might themselves be obliged to bear the burden.

The *evidence* which is given *by witnesses* in suits in equity, is always reduced to writing before it is presented to the Court, and may either appear in the shape of affidavits, or of answers to written interrogatories, according to the nature of the cause and the stage to which it has advanced. Of these two sorts of evidence, that by affidavit will be almost universally admitted to be the least satisfactory. As individuals are seldom obliged by the court to make affidavits, they are generally voluntary, and of all sorts of evidence which can be given, that where the witness reveals or withholds the truth at his own pleasure is usually the worst. Those persons by whom affidavits are made are, in half the cases that occur, interested in some way or other; they are almost invariably acting under strong excitement; and the affidavits are usually sworn to *upon the faith of their being drawn accurately by*

their legal advisers, without sufficient time or pains being bestowed in making them correspond exactly with the truth. Besides this, their number is increased in consequence of those by whom they are made mistaking the points upon which information is required, and the almost irresistible temptation which is held out to exceed the truth, in the concoction of a succeeding affidavit, when a prior one has been held deficient either in strength or fulness. All these circumstances are unfavourable to the use of affidavit evidence, and as the petitions which are preferred to the court are in general supported by their means, the encouragement which this species of testimony would receive in case any summary remedy should be allowed upon petition of the parties, forms a strong objection to the introduction of any such measure. The use of affidavit evidence can never be justified except upon the plea of absolute necessity. Whether such necessity in any case exists, has been doubted; but no doubt can be entertained at all that the vicious excess to which it has of late years been carried in the court of Chancery ought to be corrected, and that this species of testimony ought invariably to be confined within the narrowest limits to which it can possibly be restricted. The other sort of evidence consists in answers given by witnesses upon oath to written interrogatories, which have been prepared under the sanction of the court. These answers are delivered by the witnesses orally, and put into writing at the

time of their delivery, by the persons by whom the witnesses are examined. When the cause arises within twenty miles of London, these answers are taken by public officers called Examiners; but if beyond that distance, it becomes what is called a *country cause*, and the answers are then taken by commissioners named by the judge for that special purpose. Commissioners in the country, are said sometimes to put questions to the witnesses which are not contained in the written interrogatories, if by their previous answers they have been rendered necessary. The public examiners are said never to deviate from the interrogatories laid before them. To abstain from putting any question to a witness which is not contained in the string of written interrogatories, however necessarily it may spring out of an antecedent answer, and especially where the subject of examination is intricate or the witness reluctant, is but an unsatisfactory method of eliciting the truth. In addition to this, all examinations, whether taken by the examiners or commissioners, must be secret, for which the reason usually given is not very convincing; and so strict is the rule, that this examination must be conducted either by the examiners or commissioners, that no equity judge has the power of obtaining a knowledge of the simplest fact from a witness, either by examination delivered orally or taken in writing. When a motion was made before Lord Hardwicke that a witness might be orally examined, his reply was: "I cannot allow

“ the motion. The constant and established pro-
 “ ceedings of the court are upon written evidence,
 “ like the proceedings upon the civil and common
 “ law. This is the course of the court, and the
 “ course of the court is the law of the court, and
 “ though there are cases of witnesses being ex-
 “ amined, yet they have been allowed but spar-
 “ ingly, and only after publication where doubts
 “ have appeared in their depositions, and the
 “ examination has been to clear such doubts, and
 “ inform the conscience of the court;————
 “ There never was a case where witnesses have
 “ been allowed to be examined at large at the hear-
 “ ing, *and though it might be desirable to allow this,*
 “ yet the fixed and settled proceedings of the
 “ court cannot be broke through for it.”* While it
 is clear that the rule of the court is here correctly
 stated, its excellence as a means of discovering
 truth is open to very grave objections. That it is
 inferior to the *viva voce* examination invariably
 resorted to at common law, is undeniable. “ It
 “ is impossible,” said Lord Alvanley, when Mas-
 ter of the Rolls, “ to sit here any time without
 “ seeing that a *viva voce* examination of witnesses
 “ is much more satisfactory than depositions,
 “ where a possibility of doubt can be raised; and
 “ if ever a case required a *viva voce* examination,
 “ this is one.”† Such a declaration made by a
 judge who is known to have taken so much pains
 in the investigation of the principles of equity, as

* 1 Atkins's Rep. 445.

† 4 Vesey's Rep. 762.

well as in their practical administration, cannot fail to throw great doubt upon the propriety of depending exclusively upon written evidence, and his opinion receives ample confirmation from the experience of those who are best qualified to form an opinion on the subject.

Admitting, however, to the fullest extent, the errors or defects of the present mode of obtaining evidence by means of affidavits and depositions, it must of necessity continue until some plan which is more unexceptionable can be substituted in its stead. In this case an effectual remedy will not be easily provided. To send witnesses to be examined *viva voce* before the courts of common law, would be attended with this inconvenience, that those who practise in them would not be fully aware of the precise information which the court of equity wished to obtain—it would be attended with more trouble—and many of the questions asked are so difficult to be answered, that previous knowledge and consideration of them is extremely desirable. In some instances this indulgence would do no harm, but in others it would totally destroy the peculiar virtue which *viva voce* examinations is supposed to possess. Sir W. D. Evans, in his plan for the improvement of the court of Chancery which has been already mentioned, has proposed to allow masters in Chancery and certain sorts of commissioners, to be at liberty to take the depositions of witnesses to interrogatories, or to examine them orally in any

other manner.* He has not said whether he intended that masters and commissioners should be themselves the examiners, but if he did not, the introduction of barristers to examine, while the masters or commissioners should exercise the same sort of superintendence a judge now does at *Nisi Prius*, is another proposal which may be deserving of consideration. A third experiment might be made by allowing the judge to have those witnesses examined *viva voce* before himself, who happen to be present in court, or whose attendance he might in his discretion think fit to order. Witnesses may now be conveyed from one place to another so cheaply and expeditiously, that their personal examination would in many instances be the most economical as well as rapid and satisfactory method by which the conscience of the court could be informed. Though this last sort of examination is that to which of all others it seems most natural to resort, the extent to which it may be made available in practice has never as far as I know been clearly ascertained. We are apt in this country to assume that *viva voce* examination can never be beneficially employed except in presence of a jury. This may be true, but until it has been proved by experience, there is nothing in the nature of oral testimony itself which shows such intervention to be requisite. A judge must be presumed to be capable of determining the value or relevancy of evidence better than a juror, and where no question

* Evans's Statutes, vol. 7.

arises respecting the amount of damages or the commission of a criminal act, one does not see what useful purpose the presence of a jury is calculated to serve.

It may be alleged that the variety of the suggestions which have now been offered, and the admitted doubtfulness of their success, demonstrate the hopelessness of introducing any material improvement into this branch of equitable jurisprudence. It is true that the subject is surrounded with difficulties, which ought neither to be concealed nor underrated. But as a great practical imperfection is admitted to exist, it seems but reasonable that trial should be made of some of those means most likely to lead to its removal. If any of them prove successful, the public will reap a decided advantage. If they prove abortive, it would be satisfied with the strenuous though unavailing efforts which might be made to supersede those methods of obtaining testimony, which are not only insufficient to obtain a disclosure of the truth, but too frequently serve as convenient instruments for its evasion or perversion.

5. When the examination of evidence has been concluded, and before the cause comes properly to a hearing, or after it has been heard and before the decree which has been pronounced can be carried into effect, it is almost always necessary upon some point or other to obtain *a reference to a Master*. There is scarcely any stage of a cause after it has been brought to issue, in which references to a master may not become necessary.

Whenever any subject of inquiry arises involving too much detail either of facts or figures to be conducted in open Court, it is devolved upon a master for his examination and report. Without throwing out any insinuation against the conduct or capacity of Masters in Chancery, it has long been a prevailing opinion that in many particulars the method of conducting business before them is susceptible of improvement. They are now shut up each in his own office, to which none but the parties who go before them have access. The practice which prevails in one office varies materially from that which prevails in another, and it sometimes happens that it is difficult to ascertain what the practice of any one office is. Neither are there any means of discovering whether the attendances of masters are as frequent, punctual, and of as long duration as they ought to be. To throw open their offices to the public would at once obviate the whole of these objections. Publicity is by far the most effectual restraint imposed upon judges or other public characters, and Masters in Chancery are the only judges upon whom it has not yet been made to operate. Should it ever be extended to them, it is no imputation on their order, to presume that it would produce the same effect it has had upon functionaries of every other rank and description. Their energy would be increased, their attendance prolonged, their practice become more uniform, and the dispatch of business be accelerated. There are also subordinate parts of

the routine of their offices which are conceived to require alteration. It is generally felt that copy-money ought to be abolished, and masters themselves are now said to be unanimously of that opinion. This would effectually check the length and verbosity of their reports, which has become the subject of such general complaint, and is so pointedly prohibited in Lord Coventry's orders of 1635. "Whereas the Masters
" of the Court do sometimes by way of induce-
" ment, fill a leaf or two of the beginning of their
" reports, and sometimes more, with a long and
" particular recital of the several points of the
" orders of reference; they shall forbear such
" iterations, the same appearing sufficiently in the
" order, and without any other repetition than
" thus—*According to order, or By directions of an*
" *order of such a date*, shall fall directly into the
" matter of this report, setting down the matter
" clearly, but as briefly as they can, for the sake
" both of the Court and the parties."* Masters ought also to be released from the taxation of costs. It is an employment beneath their dignity, and beyond their power to discharge, consistently with the adequate performance of their other duties. It would be better therefore to appoint new officers for that special purpose. Should it still be urged that masters ought to continue to do what they hitherto have done, the reply is, that in reality they have not done it. The taxa-

* Beames's Orders, p. 81.

tion of costs is a matter to which, for a long time, they have paid little attention. Mr. Mills, in his letter to Mr. Courtenay, maintains it to be impracticable. "That the masters can tax all costs that pass through their office is out of the question. If they do so, it must be to the exclusion of all other business. Nor could any two, or even six taxing officers, exclusively appointed, get through the task. My own daily practice, in this respect, enables me to speak most positively. Why, therefore, is it proposed to disturb a practice, which, as it now stands, is of the greatest convenience to the masters, and I am bold to say, is of the greatest benefit to the suitors of the court?"* There may be the strongest reason for the Clerks in Court continuing to act as taxing officers in the manner Mr. Mills proposes, but it is right and proper at the same time, that this should be done ostensibly and directly. Why should the master be supposed any longer to do that of which the clerk in court now positively claims the merit, and why should this last again talk of the immense utility of a clerk in court, when he is in reality a taxing officer? Nothing can be more mischievous than nominally being one thing and acting as another. It opens a door to every species of irregularity and misconception, and if the press of business or any other cause, requires the relative duties or situation of judicial officers to be altered, the alteration ought

* Mills's Letter to Mr. W. Courtenay, p. 12.

to be made avowedly by the legislature. Instead of this, to allow an officer to do by means of an unauthorised deputy, that which he is supposed to do himself and which he is well paid for doing, is an arrangement which may be convenient for him, but assuredly is detrimental to the public.

Another part of the business of masters which might perhaps be devolved upon separate officers, is the taking of accounts. "When an account is taken," says Lord Hardwicke, "the Court, by its ancient constitution, is to be aided in taking it by some proper officer, as masters now are, because it is impossible for the Court to take accounts originally, as that would so take up the time of the Court, that justice could not be administered in other causes."* Masters in Chancery seem therefore to have been selected originally for that purpose, merely because they were the most convenient officers by whom accounts could then be taken, but if others more convenient have since arisen, there is no reason why recourse should not be had to their assistance. Within the last ten or twenty years, a particular class of men has sprung up who devote themselves exclusively to the investigation and settlement of accounts, and if a sufficient number of these were attached to the court of Chancery, and made to act as accountant masters, there is reason to believe that matters of account might be settled with far greater celerity

* 2 Vesey's Rep. 388.

and cheapness than under the present system. To unravel involved or fraudulent accounts is a task to which most masters must necessarily be unequal, and though they were not, the time which is requisite for that purpose would interfere with the performance of their other duties, in the same way that Mr. Mills declares the taxing of costs would be found to do. A course extremely similar to that which has now been pointed out as practicable in Equity, has long been familiar in the House of Lords. Lord Hardwicke says, "The House of Lords very often in matters of account which are extremely perplexed and intricate, refer it to two merchants, named by the parties, to consider the case, and report their opinions upon it, rather than leave it to a jury; and I should think a reference of the same kind in some measure would be the properest method in the present case."* It appears by the following passage, that the very same measure which has now been alluded to was proposed for the adoption of courts of Equity upwards of seventy years ago. "And forasmuch as sundry suitors esteem the referring the adjustment of accounts to a master, both precarious, tedious, and expensive; therefore they say it will be enacted, that every suitor may have his option in open court to declare whether the same shall be adjusted before a master or by two merchants. If before the latter, he may then nominate one, and the de-

* 2 Atkins' Rep. 143.

“ fendant the other, who legally may be bound to
“ secrecy, and vested with as ample authority as
“ any master hath done or could do. But if such
“ accounts require greater accomplishments than
“ such merchants are endowed with, or more lei-
“ sure than they can conveniently spare, in either
“ case they can substitute one or two able account-
“ ants (under obligations of secrecy) to liquidate
“ the same, to whom a reasonable compensation
“ should be ordered by the constituent, for his or
“ their trouble, at the expense of the contending
“ parties; which accounts, when settled, may be
“ signed by such merchants, and by the account-
“ ant or accountants, if any were deputed, and
“ delivered with their report to the court, which
“ will be of equal validity, as if given in and
“ signed by a Master in Chancery. This, besides
“ procuring greater dispatch at less expense,
“ will prevent the inconvenient deposition of
“ merchants’ books in the master’s office, and
“ the injurious detention thereof when there, and
“ will also exonerate them from the expense of
“ paying for their lodging when returned.”* In
this passage the author points out that precise
use of accountants which has for twenty or
thirty years past been made in the court of Ses-
sion in Scotland, and which might perhaps be ad-
vantageously resorted to in courts of Equity in
this country. The employment of accountants in
the Scotch courts, and the restrictions to which

* Animadversions upon the Present Laws of England, 8vo.
Printed for M. Cooper, London, 1749.

it is conceived they ought to be subjected, are explained in the following extracts from the report of the evidence laid before the commissioners nominated under the commission appointed to report on the appellate jurisdiction of the House of Lords. "In particular cases, such as accountings where the evidence is of a nature unfit to be investigated otherwise than by persons of skill, the Lord Ordinary, by the present practice of the court, instead of ordering a proof by commission or a trial by jury, finds it more expedient to remit the whole matter in dispute to a professional person for his report, subject to the review of the Lord Ordinary, and with reservation of all questions of law which may arise, or such questions of fact as may require evidence by jury trial, or by proof on commission. This practice the commissioners are of opinion ought not to be disturbed."* It is suggested however, and apparently with much reason, that these accountants should either be governed by specific regulations, or constituted ostensible officers of the Court. One of the gentlemen whose opinion was asked has expressed himself to the following effect. "Some arrangement ought to be adopted as to accountants. The greatest delays that take place in the Outer House are imputed to accountants. Their charges are also said to be very high. They are self-created, that is, any man calls himself an

* Report of the Commissioners on the Appellate Jurisdiction of the House of Lords, p. 9.

“accountant that thinks fit. The judge names
“the accountant to be employed. Hence they
“make interest with the judges for employment.
“The agents feel much delicacy in urging them
“to dispatch, lest they offend the judge or the
“accountant, in whom they may excite a feeling
“dangerous to their client. They are at present
“attempting to make themselves into a body by a
“royal charter, but that won’t protect the Court
“or the litigants.”* Another witness very appropriately suggests “Either that the accountant should be brought more nearly under the cognizance of the judge, or, what I should conceive to be better, there should be a class of officers of Court, whose duties should resemble in some degree, what I understand to be a part of those of a master in Chancery.”† The institution of such officers as are here specified, seems a natural and expedient measure in a commercial and wealthy country, where an expeditious and clear statement and arrangement of accounts would materially shorten and simplify the questions which, in an advanced state of society, engage so much of the attention of courts of justice. Convenience has caused them to be employed by private persons, and the same convenience seems to indicate that they ought to be employed by the public. Occasional inconvenience would no doubt be sustained by separating the consideration of questions of law from questions of account, and in

* Appendix to the Report on the Appellate Jurisdiction, p. 150.

† *Ib.* p. 131.

sending part of a cause to one master, and part of it to another; but it may be worth while to consider whether such a division of labour would not, upon the whole, cause suits to be terminated at less expense, and with greater expedition.

If the law of real property is to remain upon its present footing, *conveyancing* masters appear to be more obviously necessary than *accounting* ones. But as it cannot be desirable to multiply the classes or degrees of Masters too much, it is to be hoped the law of real property will speedily be placed upon such a footing that Masters in Chancery may be expected to report as satisfactorily upon titles, as upon any point connected with equitable law referred to them by the Court. Taxation of costs, and the investigation of accounts, are the two subjects it seems most desirable to withdraw from their jurisdiction, and provided this were done, and precautions taken that they should more generally proceed than they now do *de die in diem* until a cause were finished, instead of only devoting an hour a day to each cause, business would be dispatched with credit to the court and the masters, and to the satisfaction of the public and the parties.

One point remains to be mentioned. It is directed by the 22d of Lord Coventry's orders, which were issued in 1635, that "the register
"shall, within ten days after the end of every
"term, certify to the lord keeper what references
"depend in the hands of any master, and how
"long they have depended, that if any of them

“ have depended very long, the Court may require an account thereof from the master, and quicken him to a speedy dispatch.”* Though this appears, by a reference contained in the same page, to have been thought “ an ancient and useful practice,” it has for a long period been suffered to fall so completely into disuse, that even its existence has almost been forgotten. Lord Eldon proposes to attain the same end by a somewhat different plan. He is reported to have said he thought “ it would be a very wholesome measure if the master was to certify every half year what has been done in every cause before him; and in the causes in which but little has been done, to state whose fault that has been. The Court would see better than it has lately done who ought to be blamed.”† Whether one or both of these returns should be required to be made, beneficial consequences could not fail to ensue. They would impose a check at the same time upon judges, masters, registers, and solicitors, because they would form authentic documents which would be always within the reach of the public, and would of themselves form conclusive evidence of any neglect which might exist in the administration of justice.

6. When the master has made his report, the cause then returns to the judge by whom the reference to the master was ordered. It is then brought under his consideration in one of two

* Beames's Orders, p. 131.

† New Times of April 3, 1824.

ways: by *exceptions to the master's report*, which may be by any of the parties who think themselves aggrieved by it: or by *setting down the cause for further directions* in order to carry the antecedent decree into full effect. It rarely happens that an equitable suit is finally disposed of without being brought before the judge once or oftener *for further directions*, and there is perhaps no single part of the procedure of which the management is so difficult. The discussion which succeeds is seldom either so regular or intelligible as could be wished. However numerous the parties may be, it does not usually happen that they have had any previous communication with one another. Each comes into Court prepared to claim as much and concede as little as he can; and between a variety of interests which cross each other at every step of the investigation, the judge is obliged to decide upon a variety of contested questions of which he had no previous information, and almost without the possibility of acquiring a distinct perception of the points in which the parties agree, and those in which they differ. In the midst of this intricacy and confusion, an opportunity is afforded to counsel who are more skilful than scrupulous, of obtaining an undue advantage for their clients by means of the terms in which they procure the order to be framed, which cannot be altered afterwards without extreme difficulty. How far the evil is capable of rectification it would be presumptuous to pronounce with confidence. That some alteration

seems desirable will not probably be denied. At present, when legal rights are urged with so much subtlety on one side, and resisted on the other, it seems both natural and expedient that the litigants should as far as possible make both the judge and each other acquainted before hand with the questions which are to be raised, and the names of the parties by whom they are to be disputed. Much uncertainty and obscurity would then be removed. All persons concerned would then be prepared to proceed at once to the points at issue between them, to the furtherance of justice, and a great saving both of time and argument.

The objections which have been now made to the manner of proceeding in courts of Equity, when causes are set down *for further directions*, apply equally to that part of the business which is transacted by means of *motions*. *Motions* may be made in almost any stage of a cause, and may relate to any party or subject connected with it, where for the purposes of justice the interference of the court becomes necessary. In former times only casual or unimportant points were brought before judges in Equity in this manner, and they used then to say they "did not care to decide questions of importance upon motion."* To whatever reason it may be owing, things in this respect are now entirely altered. The state of practice in courts of Equity is such, that it is difficult to

* Browne's Chancery Reports, vol. i. p. 448.

say what motions may or may not be made. They will always be most numerous where business is conducted with the greatest dilatoriness and irregularity, but still considerable latitude must be allowed to them, or else the object of the suit would frequently be lost altogether before the suit itself could be brought to a termination. The fact is that there is scarcely any question however difficult which may not at present be made the subject of a motion. In the report on the appellate jurisdiction of the House of Lords, it is said to have been observed "that many motions have " been made before the Chancellor, the decision " upon which the parties agree shall be (though " not in form yet in fact and substance) a decision " of the cause; rendering formal hearings of the " cause and further proceedings unnecessary. " Such motions always call for discussion, requiring as much time as if the cause was regularly " heard, and prevent further proceedings in the " court." In motions of this kind, where the parties are numerous, and their conflicting rights must be determined by deductions drawn from tedious, involved, and frequently contradictory statements of facts, of which the court often knows nothing till the first counsel begins to read the motion at the bar, it may safely be pronounced impossible for any stretch of intelligence and attention to enable the judge to seize fully and correctly the arguments addressed to him, or even the questions that are brought for his decision. Some of the most acute judges who have ever sat upon the

bench have complained of the oppressive nature of this part of their duty, and it is such as no human faculties are able adequately to perform. Greater facilities are given to the Common Law judges, though the questions which come before them are a great deal less complicated. Upon one occasion the court of King's Bench "found fault with the paper books sent to them, "in omitting to notice in the margin, the points "intended to be argued, as required by a late "rule of court, of Hil. 38 Geo. 3, which they "observed was not then a new regulation, but rather a renewal of an old rule made in E.2 Jac. 2. "They observed that on the present occasion, "their attention had been entirely diverted from "the real point intended to be litigated, by looking to the cause of demurrer assigned."* Information of the nature here alluded to is always expedient, and is actually received on many occasions now by judges in equity, in those cases where the bill and answer, depositions or affidavits and other papers in the cause, are carried home by the judge, and examined by him previous to the delivery of his opinion. Why should not some sort of intimation of all but the most ordinary kinds of motions be invariably communicated to the judge? What the precise nature and extent of that intimation should be it is not necessary here to settle: but if only a copy of the notice of motion together with the prayer of

* 2 East's Reports, p. 288.

the bill if any has been filed, and the shortest chronological abstract of the steps that have taken place were forwarded to him the evening before, the information it afforded would probably be extremely welcome. By the help of such a clue, he would be at once enabled to direct his attention to the main points of the arguments employed before him, instead of being obliged to labour as he often does at present during a great part of their progress, to comprehend their object. As the difficulty attending the discussion of motions appears to render some change necessary in the manner of bringing them before the court, it seems also advisable to introduce some alteration respecting the rotation in which they are disposed of. There seems no reason why motions should not be enrolled in the same manner as causes and petitions, and why they should not, with the exception of a few classes of an urgent nature, be dispatched in the order in which they are entered. A regulation of this sort would forward several excellent purposes. It would place parties as well as counsel on that footing with respect to pre-audience on which they ought to stand, and it would promote the dispatch of business, by putting a stop to that courtesy which, in the present state of uncertainty, barristers must unavoidably shew to each other, by pointing out the precise time at which every motion must either be struck out or disposed of.

8. When a *motion*, *petition*, or *cause* has been made or heard, and a decree pronounced, it then becomes the duty of one of the registers to draw

up the minutes of the *order* or *decree* which the court has pronounced. The quantity of business which presses on the judge, precludes him in most instances from giving minute directions for drawing up orders himself, while it is always of moment that the abstract principle upon which they proceed, as well as its application to the particular case, should be expressed clearly and correctly. This is not accomplished with so much facility as has sometimes been apprehended, and instances might be pointed out in this and other countries, where both the law and the parties have materially suffered from the carelessness or incompetence of the persons to whom the preparation of the decree has been intrusted. In courts of Equity in England, the province of the registers, both from the number and complexity of the causes which are brought forward, requires a more than ordinary share of industry and acuteness, and when it is adequately discharged deserves to be very liberally rewarded. Whether a rule should be laid down or not as has sometimes been suggested, that they should be always taken from the bar, it is at least fit that they should undergo some course of trial or examination before they are admitted into their office, and not be promoted according to mere seniority as they have hitherto been. They should also be sufficiently numerous to enable them to enter all orders and decrees within a few days after the judgments have been delivered, and to deliver copies of the judgments to the parties at a certain fee, which ought not under any pretence to be exceeded. This grievance is one of the subjects

against which Lord Coventry's orders are particularly and properly directed.* Those to whom the practice of the court is most familiar, best know the mischief which delay occasions. It is always harassing; commonly detrimental to some of the parties; and on some occasions, as for instance, where attempts are made to steal marriages with wards of the court, frustrates the whole object for which the suit was instituted. It has so happened however, whatever foundation there is for the charge, that the delay which occurs in the register's office, in drawing up orders and decrees, and their enormous length and expensiveness, have always formed one of the chief charges against the practice of the court of Chancery. It was a subject of complaint upwards of a hundred and twenty years ago, that "the deputy registers
" have the drawing and passing all orders, and
" are paid for the same according to their length
" after the rate of three shillings a side, and yet
" each order must recite the next preceding order,
" and generally are included also the allegations
" of counsel, especially in orders *ex parte* and *nisi*
" *causa*, by which means orders are drawn to a
" great length, to the vast charge of suitors, considering nothing is done almost without a particular order. Now, if these recitals and allegations were omitted, and nothing taken notice of but the ordering part, the charge would be much abated, and yet the matter may be dis-

* Beames's Orders, p. 75.

“ tinct enough expressed, as it is in rules at law,
“ where nothing is contained but the ordering
“ part; and besides, orders would by this means
“ obtain greater reverence and authority, for many
“ times the reasons upon which the order seems
“ to stand, are very idle and impertinent.”*
About five and twenty years afterwards, the same
charge is repeated in still more positive and
pointed terms. “ The next,” says the writer,
“ are the Registers, whose fees are exorbitant, and
“ daily grow upon us more and more. They,
“ amongst other things, often impose unnecessary
“ copies of orders upon us, and always take three
“ shillings for the orders themselves, and make
“ four of those sides out of one sheet of paper,
“ written in a very loose hand, and stuffed with
“ impertinent recitals and suggestions, making
“ the order a great deal longer than needs,
“ so that an order in hearing shall sometimes
“ come to ten pounds, and by reason of its great
“ length, they must have a long time to draw it
“ up in, often three months, unless you give ex-
“ pedition money. Whereas, if they were drawn
“ up according to the excellent forms used by the
“ clerks of the House of Peers, in drawing orders
“ upon appeals, they would not come to a twen-
“ tieth part of what some of them do, and might be
“ drawn up in a day or two; and if the orders of
“ the court of last resort can generally be com-

* Observations on the Dilatory and Expensive Proceedings in the Court of Chancery, in relation to the Bill now depending in the House of Commons. London, 1701.

“ prised in the fourth part, or half a sheet of paper, I do not see why the Chancery orders may not be so too; and indeed that part of them which really is the order, is seldom much longer. But ’tis the insignificant recitals makes them so extravagant, and occasion also much subsequent unnecessary expense, for the entry, the enrolment, the writ of execution, and the copies thereof, are all lengthened in proportion to the order, so that these impertinent recitals are sometimes paid for five times over.”* And even Lord Hardwicke himself, who was so well acquainted with the principles and practice of the court, has unequivocally expressed himself to the same purpose. “ I could wish,” says he, “ that the orders of this court were framed with the same simplicity as orders made by the courts of common law; and to be sure in a great many instances they might; but in some special orders, the recital of the principal facts which induced the court to make these orders, are necessarily inserted, and as the drawing orders in Chancery have been for a long time practised in this manner, I will not take upon me to alter the course of them.”† It is painful to observe how much it is the practice of public men to postpone improvements which they dare not openly resist. If Lord Hardwicke or

* Proposals offered to Parliament, for remedying the great Delay and Charge of Suits at Law and in Equity, by an Attorney. London, 1725. p. 9.

† 2 Atkins’s Rep. 488.

any of his successors had promulgated a general order to the effect which he has here mentioned, one of the oldest, justest, and most constant complaints against the practice of courts of Equity would have disappeared for ever.

9. In addition to the alterations which have here been specified, two others have at different times been recommended. The object of one of them is to supersede unnecessary motions altogether, and that of the other is to obtain relief in certain cases by a more compendious road than that which it is in general necessary to follow. To the first there does not appear to be any objection. The expediency of the last may be more doubtful. All motions seem to be unnecessary which are granted of course, and no good reason can be assigned why the licence which they grant should not be obtained without the interposition of the judge at all. This alteration has been often desired, and though the relief afforded by it would not be very sensibly felt, it would still be some gain both in point of economy and dispatch, and is even more required now than when it was originally mentioned. “In
“ the courts of law,” it was said, “ for things of
“ course, rules are drawn and entered of course
“ without special order: but in Chancery, scarce
“ any thing is to be done without a particular
“ order pronounced either in court or on petition,
“ though it may be had for asking for, and cannot
“ be in justice and by the rules of the court
“ denied: and therefore this charge of moving

“ or petitioning might be spared, if the registers
“ were ordered to draw up such orders of course
“ without any particular direction. Now of the
“ matters grantable of course, there are some,
“ viz. To refer a bill or answer, or other matter,
“ for scandal or impertinency; to refer to a
“ master; to expunge scandal and tax costs; to
“ stay proceedings on a cross-bill till the first
“ bill be answered; for an injunction on an at-
“ tachment, dedimus, or time obtained to answer;
“ to add parties; to amend the bill without costs
“ before answer, or with 20s. costs after answer;
“ to accept exceptions to an answer, though the
“ time elapsed; to refer exceptions to an answer; to
“ refer an examination; for a commission to assign
“ a guardian and answer, or to plead, answer, and
“ demur; to refer a demurrer to interrogatories;
“ to refer a plea of a former suit for the same
“ matter; for an injunction on bringing money
“ into court on a bill of interpleader; to put the
“ plaintiff to his election to proceed in law or
“ equity; to dissolve an injunction-nisi on coming
“ in of an answer; to refer regularity of process;
“ for a defendant to dismiss a bill for want of
“ prosecution; for a plaintiff to dismiss his own
“ bill with 20s. costs, no further proceedings
“ being had than bill and answer; to stay pro-
“ ceedings on a report, exceptions being filed
“ and 40s. deposited with the register; to confirm
“ a report nisi; for a subpœna to rejoin return-
“ able immediately, and that service on clerks in
“ court may be good; for a *subpœna duces tecum*

“ for deeds and writings confessed in an answer ;
“ that one appearing with the register on a con-
“ tempt, may be examined in four days or stand
“ committed ; to use depositions taken in a cross
“ cause ; to examine *viva voce* at the hearing to
“ prove deeds and writings ; to examine a de-
“ fendant saving exceptions ; all orders by con-
“ sent ; to revive a suit abated on affidavit of
“ service of subpœna ad revivendum ; for a sub-
“ pœna in nature of a scire facias to revive a
“ decree for a serjeant at arms on return of a
“ commission of rebellion ; and for a sequestra-
“ tion on return of the serjeant. But if these
“ several orders were not to be had merely of
“ course, yet the charge would be much lessened
“ if as at law there was a side bar, where soli-
“ citors might move for these matters.”*

To what precise extent the proposal here made could advantageously be carried, might give rise to some difference in opinion ; but it is well known that numerous trifling matters which require the signature of counsel or to be openly mentioned in court, might be managed perfectly well without any application either to barristers or judges. Whether it would be practicable in certain cases to afford relief summarily by petition, without being obliged to travel through the regular stages of process, when perhaps none of the parties desire it, has frequently formed a

* Observations on the Dilatory and Expensive Proceedings in the Court of Chancery, in relation to the Bill now depending in the House of Commons. London, 1701.

subject of conversation. As this is now done in the case of Charities, it has been urged that the same principle might be extended to other instances. Lord Rosslyn observed on one occasion: "There would not be much harm if I was empowered upon petition to order any person, a mere trustee or a mere mortgagee, to convey the legal estate, but I apprehend I have no such authority. It must be by bill filed."* An example perhaps still more closely in point is that of trustees or executors who wish to have the opinion of the court, merely upon the meaning of a particular clause or part of a will, for their own security and direction, and to which they would conform as soon as it is intimated. It is far from certain, however, that the ultimate success of such a measure would correspond with that which has sometimes been anticipated. In the first place considerable apprehension may be entertained that the rights or claims of all parties concerned will not be correctly or sufficiently represented. Unless sufficient provision were made against this, the court would be led into the declaration of an erroneous opinion, either by an erroneous or defective statement, and then twice as much delay, trouble, and expense would be incurred to rectify the mistake as a regular suit would have occasioned. In the next place, if any evidence should afterwards prove to be requisite, which it very generally is though the

* 2 Vesey, jun. Rep. 587.

parties do not expect it, there is no other way in which it can be produced, but by means of affidavits, which are on every ground so objectionable, that their numbers ought to be sparingly augmented. At the same time, there may be some classes of cases in which the opinion of the court pronounced upon the matter specified in a petition would be acceptable to all concerned, and there can be no doubt that this summary method of disposing of a suit should be adopted wherever it is practicable. But short cuts rarely bring the parties to their object either most satisfactorily or expeditiously, and it will be found to be a far more effectual method to promote the ends of justice, to render the general course of procedure as plain and direct as possible, than to continue a system which is circuitous or perplexed, and to give leave to privileged persons to avoid its windings.

SECTION VI.

Of some of the Doctrines of Common Law which appear to be questionable.

FROM what period the Common Law of England dates its origin has been made the subject of frequent, but not very satisfactory, discussion. "Our English lawyers," says Hallam, "prone to

“ magnify the antiquity, like the other merits of
“ their system, are apt to carry up the date of the
“ Common Law, till, like the pedigree of an illus-
“ trious family, it loses itself in the obscurity of
“ ancient time. Even Sir Matthew Hale does
“ not hesitate to say, that its origin is as undis-
“ coverable as that of the Nile. But though some
“ features of the Common Law may be dis-
“ tinguishable in Saxon times, while our limited
“ knowledge prevents us from assigning many of
“ its peculiarities to any determinable period, yet
“ the general character, and most essential parts,
“ of the system were of much later growth. The
“ laws of the Anglo-Saxons, Madox truly ob-
“ serves, are as different from those collected by
“ Glanvil, as the laws of the two different nations.
“ It is difficult to assert any thing decisively as to
“ the period between the conquest and the reign
“ Henry II., which presents fewer materials for
“ legal history than the preceding age; but the
“ treatise denominated the Laws of Hen. I., com-
“ piled, at the soonest, about the end of Stephen’s
“ reign, bears so much of a Saxon character, that
“ I should be inclined to ascribe our present
“ Common Law to a date, so far as what is gra-
“ dual has any date, not much antecedent to the
“ publication of Glanvil.”* It is of less practical
utility however to trace its history, than to endea-
vour to ascertain with precision what significa-
tion the words *Common Law* are at present gene-

* Hallam’s History of the Middle Ages, vol. ii. p. 191. 1st ed.

rally supposed to bear; in what books or records its rules are to be found; or what length of probation is necessary before any doctrine or custom can be received as a component part of the system. The words *Common Law* are now held to comprise all recognised doctrines and customs whenever and however introduced, which are neither to be found in the statute book, nor depend on the adjudication of courts of Equity. This vague method of expression may in most instances sufficiently answer the purposes of conversation or of courts of justice, but cases now and then occur, in which the difficulty of giving an exact definition or description of *Common Law* has occasioned much perplexity and difference of opinion. In the great question respecting the exclusive right which the Common Law was supposed to give an author in a literary work, the foundation and properties of *Common Law* were discussed with greater learning and ability than have since been employed upon the subject. Mr. Justice Willes there explicitly declares “that principles of private justice, moral fitness, and public convenience, when applied to a new subject, make common law without a precedent; much more when received and approved by usage.”* Whether this view of the Common Law is correct or not, it is certainly not the general notion entertained respecting it. Mr. Justice Aston however goes a great deal farther. “The Common

* *Millar v. Taylor, Burrows' Rep. v. iv. p. 2312.*

“ Law,” he observes, “ now so called, is founded
“ on the law of nature and reason. The grounds
“ and principles are drawn from many different
“ fountains, says Justice Doddridge, in his English
“ Lawyer, from natural and moral philosophy, from
“ the civil and canon law, from logic, from the
“ use, custom, and conversation among men, col-
“ lected out of the general disposition, nature,
“ and condition of human kind ;” and afterwards
adds, “ which observations I make upon its ge-
“ neral name, to free it from the imputation of
“ there being any thing restrictive of its efficacy
“ in the name itself, or that it is not equally com-
“ prehensive and co-extensive with the principles
“ and ground from which it is derived. The
“ Common Law, so founded and named, is uni-
“ versally comprehensive. In respect to the se-
“ veral species of property, though the rules touch-
“ ing them must ever have been the same, yet the
“ objects of it were not all at one time known to
“ the common law, or to the world.”* Mr. Justice
Yates’s opinion is diametrically opposite. “ To
“ constitute a legal custom it must have these two
“ qualities : First, a custom must import some
“ general right in a district, and not a few mere
“ private acts of individuals. And in the next
“ place, such custom must appear to have existed
“ immemorially. All customs operate, if they have
“ any operation, as positive laws. The mere fact
“ of usage will be no right at all in itself ; but
“ when a custom has prevailed from time imme-

* Burrows’ Rep. v. iv. p. 2343.

“ morial, it has the evidence of some immemorial
 “ law. If the custom be general, it is the law of
 “ the realm, if local only, it is the *lex loci*, or law
 “ of the place. Now all laws are general as far
 “ as the law extends, and all customs of England
 “ are of course immemorial. No usage, therefore,
 “ can be a part of that law, or have the force of a
 “ custom, that is not immemorial.”* Lord Mans-
 field, on the other hand, differs from Mr. Justice
 Yates, and supports the doctrine of Mr. Justice
 Aston. “ From what source then,” he asks, “ is
 “ the Common Law drawn, which is admitted to
 “ be so clear, in respect of the copy before pub-
 “ lication? From this argument, because it is
 “ first, &c. I allow them sufficient to shew, it is
 “ agreeable to the principles of right and wrong,
 “ the fitness of things, convenience and policy,
 “ and therefore to the Common Law to protect
 “ property before publication.”† The vagueness
 and inconsistency of the notions which here appear
 to have been floating in the minds of some of the
 ablest doctors who ever sat in Westminster Hall,
 upon so fundamental an article of judicial faith,
 must necessarily create much doubt and perplex-
 ity respecting the foundation upon which a large
 portion of the Common Law of England really rests.
 Part of it appears to consist of customs which
 are, in the strict acceptation of the term, *immemo-
 rial*; part of it upon customs which are admitted
 to be *not immemorial*, though in courts of law pre-

* Burrows' Rep. v. iv. p. 2368.

† Ib. p. 2399.

assumed to be such ; and perhaps the most considerable portion of the whole is composed of determinations and resolutions of the judges, proceeding upon analogy, public policy, and natural justice. It is somewhat surprising that no attempt should ever have been made in England to make an entire or partial collection of the rules of the Common Law, or at least to render its general maxims and principles more public and specific. The French Customary law began to be systematised by Charles VII., lingered till Louis XII., and was completed a little before the end of the reign of Henry IV. in 1610. Its reformation is said to have been nearly completed about the beginning of the Revolution in 1792.*

The words *Common Law*, in the course of the observations which are now about to be made upon a few of its doctrines, are used in their widest signification. They are intended to embrace the whole of that code, whether founded upon statute, usage, or precedent, which is now administered in the common law courts of Westminster Hall. Into any general inquiry into its abstract or comparative merits as they appear in practice, it is not necessary to enter. That branch of the Common Law which relates to *real property*, always was in some respects repugnant to natural justice, and in others has now become antiquated and inconvenient. That which relates to *personal property, rights, and*

* Butler's Reminiscences, p. 48.

obligations, arose in better times, and is entitled to greater commendation. Such of its provisions as relate *to the liberty of the subject*, and to *the trial of every question which may arise between subject and subject*, or *between a subject and the crown*, are entitled to the warmest expressions of admiration and regard. These branches of Law constitute perhaps the most valuable portion of the municipal code of every kingdom, and that of England is in this respect superior to every other which has existed in ancient or modern times. It must also be acknowledged that most of its leading maxims and positions, are well calculated to promote just feeling and correct conduct among the members of that community for whose government they are intended. While every candid inquirer will feel himself bound to bear this testimony in its favour, it cannot on the other hand be dissembled that it is chargeable with very considerable errors and defects. Whether they owed their origin to confined information, passion, prejudice, or the exigencies of a fiercer age, they are not reconcilable to the enlarged views now entertained with respect to justice or sound policy. Some instances of those which seem to come under this description shall now be brought into notice, for the purpose of demonstrating the benefit which the Common Law would derive if it were subjected to a careful and complete survey.

1. The first class of doctrines of which the expedience may be doubted, are some which appear to clog the administration of justice. As the

Common Law of England is now administered sufficient bail is not always taken to ensure the appearance of the party from whom it is exacted ; it does not permit the outer door of a dwelling house to be broken open upon civil process ; and as it has no public prosecutor, it devolves the duty of prosecution on the party who has sustained the injury, and who is not always the best able or most willing to discharge it.

That “ excessive bail had been required of persons committed in criminal cases, in order to elude the benefit of the laws made for the liberty of the subject,” is one of the grievances most justly complained of in the Petition of Right, and of which the redress was anxiously secured by the act of settlement.* On the other hand, to rest satisfied with insufficient bail for the appearance of those who are accused of having committed or attempted a criminal act, is not less dangerous and reprehensible. It can be viewed in no other light than as a bribe received by the law with the one hand, for conniving at the escape of an accused individual, which it is pretending to secure with the other. There is no difficulty in fixing either theoretically or practically the amount of bail which ought to be taken. It ought neither to exceed or fall short of the sum which is sufficient to ensure the appearance of the person accused to answer the charge preferred against him, and it must depend so completely on his fortune, character, and rank in life, that a

* 1 Will. & Mary, sess. 2. c. 2.

hundred thousand pounds may be less adequate bail in one instance, than forty shillings in another. If it is expedient that bail to a large amount should never be demanded, let it be so enacted, and the consistency between the letter and practice of the law will then be restored. This consistency however could only be purchased at the expense of its impartiality. It would give an advantage to the rich over the poor, which no arguments drawn from the feelings of the prisoner, or the consequences which his exposure might bring upon his friends, relatives and society can ever fairly justify. If an ear is lent to considerations of this nature they would soon lead to every species of partiality and iniquity. If on the contrary the present law with respect to bail be equal and expedient, as I believe it is, then the law ought to be expounded in such a manner that it could neither be misunderstood nor evaded. The judicial officers by whom bail is taken would then be deprived of every excuse for departing from its letter and spirit, and no public injury, but much substantial benefit, would probably be found to result from its honest and uncompromising execution.

While the provisions of the law with respect to bail seem to stop the course of justice in consequence of being, in some cases, insufficiently enforced by its officers, the law itself appears to contribute to the same effect by conferring upon the outer door more extensive privileges than are known in any other country. Blackstone expressly

says, “ that no outer door can be broken open to
 “ execute legal process.”* Mr. Justice Best is re-
 ported to have lately said, “ This is the general
 “ doctrine, and no officer with respect to the exe-
 “ cution of a civil warrant has a right to break it
 “ open, except for the apprehension of persons
 “ guilty of felony, suspicion of felony, breach of
 “ the peace, or for the recovery of a penalty due
 “ to the King.”† However popular this doctrine
 may be, especially among those who apprehend
 they cannot be secured against legal process in
 any other manner, it is exceedingly difficult to con-
 ceive how it ever came to be established. Instead
 of forming an original part of our constitution, it
 would appear, when traced to its source, to rest
 upon no other foundation than a single decision
 of the judges in the 18th of Edward IV.‡, delivered
 without reasons and since followed without ac-
 quiescence. Justice Popham doubted not long
 after the first determination, whether the outer door
 was privileged, “ because it would be a hinderance
 “ to justice;”§ and Mr. Justice Foster, to whose
 authority on such points, as much respect is due as
 that of any judge who ever sat in an English court
 of justice, has observed that “ the rule that every
 “ man’s house is his castle, when applied to ar-
 “ rests on legal process, has been carried as far as

* Blackstone’s Commentaries, v. iv. p. 223.

† New Times, March 5, 1824.

‡ See Cowper’s Reports, Part I. where the authorities are fully examined.

§ Semaine’s Case, in Yelv. Mich. 44 Eliz.

“ political justice will warrant, and perhaps further
“ than in the scale of reason and sound policy
“ they will warrant.”* There is very little doubt
that it has, and for this reason among others, that
though so well known at Common Law it is quite
unknown in Equity. But if it is good in courts
of Common Law, it ought to be equally good in
courts of Equity, where it has in no instance been
adopted. By the practice of that court, doors are
broken open without ceremony, and the person of
the defendant seized, both before and after decree,
in the ordinary course of process.† And why
should it be otherwise? As long as a warrant
to arrest is regularly issued, nothing whatever
should resist it. That no outer door should be
broken open at unseasonable hours, in order to
arrest an individual upon civil process is indis-
putable; but at all due hours there seems no rea-
son why he should not be seizeable whenever and
wheresoever he can be met with. To compel an
officer armed with the authority of a court of
justice to stop at a locked outer door after having
due notice of his errand and office, and to post
himself in ambuscade like a thief or assassin,
until he can surprise the individual whom he durst
not directly and deliberately coerce, certainly ap-
pears a barbarous and demoralising institution.
The more the subject is considered, the more un-
accountable it cannot fail to appear, that a pro-
ceeding which has the demerit of being at once

* Foster's Crown Law, tit. Homicide.

† Dickens, p. 695.—2 Merivale's Rep. 397.

timid and insidious, should have found a place in the jurisprudence of a free and enlightened people. It is favourable only to those to whom no favour ought to be extended; it increases instead of diminishing the resistance which is made to legal process; and is subversive of that reverence and submission which should be yielded to every part of judicial administration.

It has also been supposed that the regular and energetic dispensation of justice has suffered from the want of a public prosecutor. In a community, living under the protection of good and equal laws, the prosecution of offences against the public may either be committed to a public prosecutor, left to the prosecution of those individuals who have been injured, or it may be permitted either to the public prosecutor or private party, in case he who had the prior right should forbear prosecuting. The law of England has adopted none of these courses. For great state-offences a public prosecutor is appointed, but for criminal offences of an inferior nature, of which the bulk of those which occur are known to consist, it neither has authorised a public officer to act, nor permits the private party to forbear from acting. How private individuals became by law compellable to prosecute, does not distinctly appear. The statute of 2 & 3 Philip & Mary, c. 10, only empowers magistrates to bind the parties mentioned in it to give evidence, but not to bind them over to conduct the prosecution. The practice of binding over to prosecute, however, has

now become so inveterate, that it is considered to be as well settled as any part whatever of the Common Law. The utility of such an arrangement is supposed to consist in this, that as private persons are made the prosecutors, the practical severity of the laws must necessarily be proportioned to the general feelings entertained respecting the enormity of the crime committed, and because it increases the interest which the public takes, both in the provisions of the law and its execution. Perhaps neither of these objects is so effectually attained as is usually supposed. The alacrity or reluctance shewn by a private party to institute a prosecution, and his activity or remissness in conducting it, are among the most fallacious tests by which the general opinions of the public respecting the expediency of the criminal laws can be estimated; and so far from increasing the interest of the public either in the state of the law or its execution, it frequently produces a rooted abhorrence to both. To compel a person who has been injured in his person or property to submit to the further trouble, anxiety, and expense, which a prosecution unavoidably occasions, and for which the indemnification he receives by the 25 Geo. 2. c. 36, 18 Geo. 3. c. 19, and 27 Geo. 3. c. 3, amounts to no adequate compensation, is felt to be so severe an exaction that the fulfilment of it is evaded as far as it can. The consequence is, that the suit which the private party is bound to institute is usually brought merely for the sake of form, to save the forfeiture which would be

incurred by non-prosecution, and is pursued with so much carelessness before the tribunal where it is brought, as to ensure the acquittal of the criminal. What is worse, in many of the nightly quarrels and offences by which the public tranquillity, especially in large towns, is principally disturbed, the magistrate before whom they are brought for investigation, frequently sees and hears them compounded for between the complainant and defendant, without being able effectually to prevent a species of compromise which is in itself as prejudicial to the cause of justice as the offence of which it then becomes the termination. The compensation which, during the middle ages, was, in the case of murder and manslaughter, given to the relatives of the deceased, is now in offences of a less atrocious description, given by way of indemnification to the individual himself who has suffered. The public, whose interest it is that such deeds should be repressed, or punished if they are committed, is left almost entirely unprotected, and the probability or rather certainty of being able to buy off the prosecutor if the offender should be arrested, is the cause of many offences which otherwise never would have been committed. The grand objection to a public prosecutor, arises from the change it would make in the law, and the danger of delegating to comparatively subordinate officers that discretionary power with which they must necessarily be intrusted. As they could not conveniently be placed under the superintendence of the Attorney

General, they must be guided in the selection of the cases they prosecute by their own discretion, as the indiscriminate prosecution of all offenders would be incompatible either with wisdom or humanity. Upon duly weighing the arguments for and against the appointment of a public prosecutor, it is not easy to determine which scale preponderates. The public hitherto really knows little of the practical effect which the present law produces; and the examination of the magistrates of the metropolis, or of some other persons personally acquainted with the effects which result from intrusting prosecution for criminal offences of a minor nature to the injured party, appears to be one of the first steps which ought to be taken in order to come to a right understanding on the subject.

Justice is also often impeded, or defeated, by that law which requires that all criminal offences should be inquired into as well as tried in the county where they are alleged to have been committed. This regulation may be ascribed partly to the division of the kingdom into counties, and partly to the humane endeavour to try all causes at the least possible cost and trouble, and in that place where the jury was likely to be the best judges of the value of the evidence. But the variety of exceptions to the general rule which have at different times been introduced, the facility of communication now established between different parts of the country, and the shameful escapes from justice which the general rule has

unfortunately occasioned, make it desirable that it should be subjected to some modification. In a large proportion of the causes which are tried, as for example, with respect to murder and homicide; stealing money, cattle, goods, or effects; offences against acts imposing taxes; the plundering of ships; the black act; offences against the coin; the destruction of ships and dockyards; and various others,* it is so difficult to charge or prove in what precise district jurisdiction or county, the primary or collateral facts were begun carried on or completed, that let the pleadings be drawn with whatever skill and care they may, so many technical objections may be offered, either during the trial or in arrest of judgment, that doubts are apt to spring up in the mind, whether the law be really intended for the protection or the punishment of the guilty.

As the rules which now exist with respect to the limits of jurisdiction seem to be too favourable to persons tried for criminal offences on the one hand, it has been thought too severe on the other to deny them the benefit of counsel, except for the purpose of cross-examining the witnesses for the prosecution, and to examine those who may be adduced in their own favour. It was long ago strongly pressed by Sir Bulstrode White-locke, "That a man for a trespass to the value of sixpence may have a counsellor at law to plead for him, but that where life and posterity were concerned, he was not allowed that privi-

* Starkie on Criminal Pleading, vol. i. pp. 1—30.

“ lege, and the assistance of lawyers. He was of
“ opinion that a law to reform that defect would
“ be just, and that what was said in vindication or
“ excuse of that custom, That the judges were
“ counsel for the prisoners, and were to see they
“ should have no wrong done them, had but little
“ weight in it; and were they not to take the same
“ care of all causes that came before them?”*

Notwithstanding the force of these observations, to allow counsel to speak for the prisoner would probably prove in reality an injury and not a benefit, and seems calculated to promote so popular a manner of conducting both the prosecution and defences of criminal causes, that there is reason to apprehend the introduction of it would not be favourable to the ends of justice. If any change were to be made, it would perhaps be better effected by preventing counsel from addressing the court against them, than to counteract these speeches by afterwards hearing others in their justification. The indictment, libel, or summons, which sets forth the cause of trial, ought to be made sufficient of itself if it is not so now, to enable the jury to understand the nature and connection of the different parts of the evidence. To allow counsel to give either a dry detail or exaggerated statement of circumstances which have not been proved and perhaps have no existence, can never assist the understandings of the jury though it may easily pervert them.

The last point respecting this part of the law

* *Lives of the Chancellors*, vol. i. p. 119.

which it seems necessary to mention, is *the benefit of clergy*. Happily for the welfare of the laity as well as good order of the church, all persons who would have been entitled to the benefit of clergy, have in this country long been amenable to the same penal laws which restrain every other description of their fellow subjects. Upon what ground then, or for what purpose, is this antiquated phrase, and the idle ceremony which is required to give it effect, of compelling those convicted of felonies not capital, on their knees to beg the benefit of the statute, retained with so much pertinacity? On whatever occasion the benefit of clergy is heard of, no principle or practice is called up in the mind which do not run counter to the very first principles of justice; and in the present state of society and advancement of knowledge it seems high time that all name and mention of so odious and unreasonable an exemption should be totally abolished.

2. A second branch of the Common Law of extremely suspicious utility is that which relates to the acquisition and descent of real estates. In speaking of the rights or estates in real property which the law now permits a man to acquire by wrongful acts, Chief Justice Mansfield expresses himself thus: "The case will now be decided upon
 " the last point, and since it will consequently be
 " unnecessary to decide on any of the points argued
 " in the court of King's Bench, where this objection was never touched on, it must not be at all
 " inferred or supposed that the authority of the

“ judgment of that court is in any respect im-
“ peached by this decision. We could not at
“ present give judgment on these points, because it
“ would first be necessary minutely to examine the
“ old authorities, which, upon the present grounds
“ of our decision, it would be superfluous to do.
“ If the doctrine of estates arising by disseisin,
“ is such as has been stated by the defendant’s
“ counsel, we must lament that the law is such.
“ Our ancestors got into very odd notions on
“ these subjects, and were induced by particular
“ reasons, to make estates grow out of wrongful
“ acts. The reason was, the prodigious jealousy
“ which the law always had of permitting rights to
“ be transferred from one man to another, lest the
“ poorer should be harassed by the rights being
“ transferred to more powerful persons. Hence
“ arose all the law of maintenance, which, if
“ strictly adhered to, one does not see how a poor
“ man could, at this day, possibly recover a
“ right.”* Various other particulars might be specified relative to the acquisition of estates by wrongful acts, in which the notions of our ancestors are no less odd than those here mentioned with respect to *disseisin* and *maintenance*. The whole doctrine of the law of England respecting *intrusion*, *abatement*, *discontinuance*, and *deforcement*, though not productive of so much actual wrong as might be expected, still continues to form an integral part of the law of the land, is unsuitable

* Taunton’s Rep. v. i. p. 613. 1 Burrows’ Rep. 113.

to the present times, and occasionally works considerable practical inconvenience and injustice.* Some of the rules of descent which are still in force, appear in the present day to be equally strange and objectionable. Lord Rosslyn has remarked, that “ There are some rules of descent “ that do not exactly square with the common “ feelings of mankind in the present state of so- “ ciety. That rule carrying the estate of the son “ to the uncle instead of the father,—that the fa- “ ther must take through the uncle, and cannot “ take directly from the son, strikes one as very “ hard. In many cases the rule that makes the “ sister of the whole blood take in preference “ to the brother of the half blood, contradicts the “ common apprehension of mankind, and the ge- “ neral convenience of families.”† The whole of these antiquated doctrines ought at once to be swept away, and their place supplied by a few plain and comprehensive maxims, adapted to the times in which we live, and such as would recommend themselves to the good sense both of lawyers and the public.

3. A third part of the Common Law of England which might be submitted to re-examination is that which pronounces agreements *without consideration*, otherwise termed *voluntary agreements*, to be invalid. By the law of all countries, certain requisites are necessary to make agreements bind-

* Blackstone's Commentaries, v. iii. c. 10.

† Vesey, Jun. Rep. v. ii. 426.

ing, and particularly those which are of a voluntary nature. By the Roman law, a mere *nudum pactum* was inoperative, but whether this extended to written agreements or not, is uncertain.* By the law of England, deeds which are signed, sealed, and delivered, are deemed instruments of so high and formal a nature, that they are binding on those by whom they are executed, whether there has been any consideration or not. Agreements, though in writing, are not binding without sealing and delivery, unless entered into for a valuable consideration. "It is undoubtedly true," Lord Chief Baron Skynner remarked when delivering the opinion of the judges in the House of Lords, "that every man is, by the law of nature, bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor applies any remedy, to compel the performance of an agreement made without sufficient consideration. Such agreement is *nudum pactum ex quo non oritur actio*; and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only it is to be understood in our law."† In our courts of Equity, the doctrine is the same as at Common Law. If a voluntary *deed* is regularly executed by signing, sealing, and delivery, it is

* See Vinnius, lib. 3. tit. De Obligationibus, p. 596. and De Pactis, cap. 5.

† 7 Term Reports, 350. Rann v. Hughes. Bracton, cap. 1. De Actionibus, and Plowden, 308 b. who trace its progress in the Law of England.

held good in equity as well as at law without consideration. This is not the case with voluntary *agreements*, even though in writing. Unless a valuable consideration has been given to the persons by whom *agreements* have been entered into, courts of Equity will not interpose either to enforce or obstruct their execution. That some shape or form which implies a determinate act of the mind should be necessary to give validity to most kind of agreements cannot be doubted; but there is no apparent reason why every agreement which is in writing, and signed by those who are parties to it, and especially if in the presence of witnesses, should not be executed by courts of Equity, whether it has been entered into gratuitously or not. Grotius and Puffendorff* as well as Chief Baron Skynner, both lay it down as a principle, that by the law of nature every man is bound to fulfil his engagements, and the only exceptions to its operation are cases of fraud or surprise against which courts of Equity invariably afford a remedy. If voluntary agreements were rendered in equity equally binding with others, it would save much trouble to which courts of Equity are now put in inquiring whether an agreement has been entered into for a valuable consideration or not, and would supersede a great deal of the inconclusive and inconsistent reasoning with respect to the *nature* and *amount* of the *consideration*, upon which their opinions and determinations on this subject have proceeded. And

* Grotius de Jure Belli & Pacis, lib. 2. cap. 11. De Promissis. Puffendorff, lib. 3. cap. 5.

what harm would ensue, if voluntary agreements reduced to writing and signed by the parties, were good even in courts of Common Law against all the world? It would sometimes bear hard upon those who enter into gratuitous agreements to have them enforced against them; but the invalidity and revocation of gratuitous agreements is no less hard at present upon those in whose favour they have been executed, and who may have been induced by them to enter into obligations and relations which they would not have otherwise contracted. Indeed it may be fairly questioned, whether the distinction which now subsists in courts of Common Law between *deeds* and *agreements*, ought not to receive some modification. The *sealing* of deeds, which was of so much use when few people could write, is now of no use at all; and as the seals are almost invariably appended by the law stationers by whom deeds are prepared, the use of them might well be superseded. With respect to the *delivery* of *deeds*, it seems strange that the *delivery of them in the presence of witnesses* by the party should be requisite, while the *signature* of them by him is not necessary. The *signature* of them by him in the presence of witnesses is an act of greater formality, and would rather increase than diminish the security against surprise, if it were substituted in its stead. If the *sealing* and *delivery* of deeds could with safety be dispensed with, and *signing in the presence of witnesses* were introduced as a substitute, two very desirable consequences would follow: the law itself would become more simple, and that

simplicity would give rise to fewer actions, in consequence of non-compliance with its directions.

4. Another point in which the law of England is still open to animadversion is the apparent severity of the doctrines of *attainder* and *corruption of blood*. The consequences of *attainder* for high treason are, that the offender upon judgment being pronounced forfeits for ever to the king all lands of inheritance of which he is seised in his own right, and all rights of entry on lands in the hands of others, the profits of all lands of which he was seised in his own right or in right of his wife, and that whether it be for years, for his own life, or the lives of others. In petit-treason and felony, the offender also formerly forfeited to the king, upon judgment of death or outlawry being pronounced, all his lands and tenements for a year and a day. By the 54 Geo. 3. c. 145 the effects of attainder with respect to real property are taken away, except during the life of the attainted person, and “except in case of treason, petit-treason or murder, or for abetting, procuring, or counselling the same.” Personal estate and effects still become wholly forfeited to the crown in high treason or misprision of treason, petit-treason, all classes of felonies, whether clergyable or not, petit larceny, for refusing to plead by standing mute, and also for fleeing from justice on an accusation of treason, felony, and even in the case of petit larceny, if the jury find the flight.* Upon judgment being

* Hawkins's Pleas of the Crown, iv. pp. 479, 493.—Blackstone's Comment. p. 381. & seq.

pronounced in the cases excepted by 54 Geo. 3. c. 145. corruption of blood immediately ensues; the person convicted loses all nobility and gentility; and he can neither become an heir, nor can any other become an heir to him.*

Though these laws respecting forfeiture and corruption of blood are administered with extreme mildness and forbearance, one cannot help wishing that they were subjected to some still greater alteration. They could not be endured if executed with rigour, and the very moderation which is invariably exercised respecting them pleads powerfully in favour of a further change. With the exception of treason, it is difficult to conceive upon what principle *forfeiture* can in any case be justified. All the profit which forfeiture brings to the Crown is neither considerable in amount nor creditable in its nature. It is also peculiarly inappropriate as a punishment; and now that the amount of the personal property of the kingdom has swelled to such an amount, the power which it may give to the crown is liable to considerable objection. If the eldest son of a wealthy family, who had received a patrimony of one or two hundred thousand pounds in the funds from his father, should from his own evil disposition or the influence of bad example, steal in a dwelling house to the amount of forty shillings, is it reconcileable to any notions of policy or justice received among mankind, to maintain that his whole

* Hawkins, iv. p. 494.

family and relations should be stript of this property, and that the whole of it, in consequence of this species of delinquency, should be confiscated to the crown? It has always been deemed one of the most incontrovertible principles of criminal law, that punishment should be confined invariably to the guilty, and ought never to affect the innocent. Treason is the only admitted exception. Its expediency in that instance has been urged by Mr. Yorke,* with all the learning and ingenuity that can be brought to bear upon it, and the ground upon which it rests, is summed up by Blackstone with great perspicuity and ability. The natural justice of forfeiture or confiscation of property and corruption of blood for treason is alleged by him to be founded on this consideration, “that he who
“hath thus violated the fundamental principles
“of government, and broken his part of the original contract between the king and people,
“hath abandoned his connections with society,
“and hath no longer any right to those advantages which belonged to him purely as a member of the community: among which several
“advantages the right of transferring or transmitting property to others is one of the chief.
“Such forfeitures moreover, whereby his posterity
“must suffer as well as himself, will help to restrain a man not only by the sense of his duty
“and dread of personal punishment, but also by
“his passions and natural affections; and will in-

* Considerations on the Law of Forfeiture.

“terest every dependent and relation he has to
“keep him from offending. According to that
“beautiful sentiment of Cicero, *nec vero me fugit*
“*quàm sit acerbum, parentum scelera filiorum pœnis*
“*lui: sed hoc preclare legibus comparatum est, ut*
“*caritas liberorum amiciores parentes reipublicæ red-*
“*deret.*” He adds however, “Yet many nations
“have thought that this posthumous punishment
“savours of hardship to the innocent; especially
“for crimes that do not strike at the very root
“and foundation of society; as treason against
“the government expressly does.”* That every
legislature possesses the abstract right to punish
traitors either by forfeiture, or corruption of blood,
or both, admits of no controversy. The expedi-
ency of enforcing it is a much more difficult
question, and that must depend upon the dispo-
sition and opinions prevailing among the subjects
of each particular state, and the peculiarities of
its situation. Treason is a crime of which the
effects are so calamitous and extensive, that the
penal enactments against it ought doubtless to
be relaxed with much circumspection. But it
may justly be apprehended that the pains annexed
to it have hitherto partaken more of the nature
of savage unrelenting vengeance, than of firm and
considerate punishment, and that the present
opinions and condition of mankind cause them to
be regarded with increasing aversion. Upwards
of a century ago it was provided by an act of

* Blackstone's Com. iv. pp. 383 and 388.

Anne,* that after the death of the Pretender and his descendants, “no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons other than the right or title of the offender or offenders, during his, her, or their natural lives only; and that it shall and may be lawful to every person or persons to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders should or might have appertained, if no such attainder had been, to enter into the same:” and it is to be regretted that it should have been deemed necessary by the 39 Geo. III. c. 93, to repeal these merciful enactments. If it should be thought safe to re-establish the provisions of the act of Anne, a more favourable opportunity than the present could not occur for their restoration. We are equally free from foreign war and domestic disaffection, and the whole body of the people are deeply and sincerely attached to the sovereign and the government. Whatever portion therefore of the penal laws inferring forfeiture or corruption of blood for the commission of public or private offences,† should be now remitted, the relaxation could be ascribed to no other motive than a disinterested zeal on the part of the advisers of the crown, to introduce every alleviation into the criminal code

* 7 Anne, c. 21, § 10.

† 2 Blackstone's Com. 268. 277.

which can be done without endangering the constitution and tranquillity of the country.

5. Closely connected with the doctrines respecting forfeiture and corruption of blood, is *the indissolubility of allegiance*. With respect to the indissolubility of allegiance, Mr. Justice Foster says that, “with regard to natural born subjects there
“ can be no doubt. They owe allegiance to the
“ Crown at all times and in all places. This is
“ what we call natural allegiance, in contradis-
“ tinction to that which is local. The duty of
“ allegiance whether natural or local, is founded
“ in the relation the person standeth in to the
“ Crown, and in the privileges he deriveth from
“ that relation. Local allegiance is founded in
“ the protection a foreigner enjoyeth for his per-
“ son, his family, or effects, during his residence
“ here; and it ceaseth whenever he withdraweth
“ with his family and effects. Natural allegiance
“ is founded in the relation every man standeth
“ in to the Crown, considered as the head of that
“ society whereof he is born a member, and in
“ the peculiar privileges he deriveth from that
“ relation, which are with great propriety called
“ his birthright. This birthright, nothing but his
“ own demerit can deprive him of. It is inde-
“ feasible and perpetual; and consequently the
“ duty of allegiance which ariseth out of it, and
“ is indispensibly connected with it, is in consi-
“ deration of law likewise inalienable and per-
“ petual. The merit of Dr. Story’s case in point

“ of substantial justice, Dyer 298, turned singly
“ upon the doctrine of natural allegiance, and in
“ a very modern case this doctrine was treated
“ by the court as a point never yet disputed.
“ How far prudential considerations guided, or
“ reasons of state, *or even the principles of natural*
“ *equity* may, under certain circumstances, induce
“ the Crown to dispense with the rigorous exe-
“ cution of a law, extremely right and expedient,
“ considered as a general rule, falleth not within
“ the compass of my present inquiry. The doc-
“ trine of allegiance founded in birth, may, as I
“ have said, be considered as a good general rule,
“ though not universally true. Cases may be put
“ which may be considered as exceptions to it;
“ which I will not enter into at this time.”* I
believe at the time the passage now quoted was
written, the principle contained in it, was main-
tained by every state in Europe. The Code Na-
poleon first subjected it to an important modifi-
cation. It recognised the dissolution of the na-
tural allegiance which every person owes to the
sovereign authority under which he was born, in
the three following cases: where a natural born
subject becomes naturalised in a foreign country;
where he accepts office under a foreign govern-
ment without leave of the head of the government
of France; and by every sort of establishment by
which he fixes himself abroad without any inten-
tion of returning. The means are also pointed

* Foster's Crown Law, p. 183.

out by which the privileges of natural allegiance may be recovered; but it would appear that the old law which punished capitally every natural born Frenchman who is seized bearing arms against his country, has up to this time received no mitigation.* With respect to bearing arms against the country in which a person is born, the greatest degree of indulgence yet known in Europe, seems to have been introduced into Germany at the late general peace. By the act relating to the federative constitution of that country, acceded to by almost all the great and small states of the empire in 1815, permission is granted by the second section of the 18th article, “ d’entrer au
 “ service civil ou militaire de quelque état confé-
 “ déré que ce soit, bien entendu cependant, que
 “ l’exercice de l’un ou de l’autre de ces droits ne
 “ compromette l’obligation au service militaire que
 “ leur impose leur ancienne patrie. Et pour qu’à
 “ cet égard la différence des loix sur l’obligation
 “ au service militaire ne conduise pas à des résul-
 “ tats inégaux et nuisibles à tel ou tel état parti-
 “ culier, la diète de la Confédération délibérera
 “ sur les moyens d’établir une législation autant
 “ que possible égale relativement à cet objet.”†
 The old international law has also undergone some change in the United States of North America, but of its nature and extent I am at present unin-

* Code Civil, 7—21. Code Pénal, 75.

† De Martens, Supplément au Recueil des principaux Traités, tom. vi. pp. 366 and 378.

formed. The whole course of events shows that the doctrine of indefeasible allegiance, which every man was supposed to owe to the sovereign authority under which he was born, is either shaken or subverted in every quarter of the globe. That it may in some countries give way too fast or too far, may be extremely possible; but the more the subject is submitted to close and unrestrained inquiry, the more apparent it will probably become, that the abstract ancient rule should be accommodated to the present views and circumstances of society. Nor is there any reason why it should not. The visionary and undefined apprehensions, which princes and statesmen have sometimes entertained of the consequences that would follow, will be found, like many other objects of superstitious terror, to vanish upon close examination. The farther the investigation is carried, the more indisputably I believe it will appear, that its enforcement has brought no addition to the prosperity or security either of king or government, and that its abandonment will detract from them as little. The establishment of freedom of trade, freedom of conscience, and freedom of emigration, all of which at the outset successively gave rise to dismal forebodings and anticipations, have now been found as beneficial as honourable to those countries where these inestimable privileges have been bestowed, and there seems no reason why the power of transferring allegiance from one state to another should not complete our deliverance from unsocial restraint. It

is in vain for any state to try to make a prison of its territory, or to extort from its forisfamiliaried offspring that submission which they are disinclined to yield. The same maxims which in political economy apply to capital, apply in jurisprudence to the individuals who possess it. They will never leave a country unless they have good reason for doing so, and if such reason exists no unkind or vindictive enactments will retain or recall them. Allegiance ought not to be dissolved either hastily or slightly, but if a person voluntarily severs himself from the scenes and associations which bind him to the land of his nativity, and plants himself in a foreign soil which he henceforth makes the centre of his interests and affections, it is difficult to conceive why the circumstance of his having happened first to draw his breath in a particular spot should impose upon him an obligation which neither lapse of time, nor declaration of intention, can destroy. Not a single individual has probably ever been deterred from engaging in any hostile act or enterprise by the punishment now denounced against breach of allegiance, nor would one more be induced to engage in them hereafter in consequence of their modification. To fight against one's country is so repugnant to our strongest feelings and opinions, that, except in the case of deserters from the naval or military service, whoever is guilty of it might almost be left to that which is the most severe and effectual of all inflictions, the consciousness of his own baseness, and the universal

abhorrence which is entertained of it by the rest of mankind. If the doctrine of allegiance were a question of curiosity merely, there would have been no occasion to have said so much regarding it. But it is one of our laws which cannot be examined with too much solicitude, either in regard to the reasons on which it is founded, or the consequences to which it leads. Neither the temper which every where prevails, the intelligence which abounds, nor the commercial intercourse which we carry on with all parts of the world, will suffer us to carry it actually into execution; and should any attempt at its enforcement be hereafter made, we may find, when such a crisis arrives, that we have advanced principles which we can neither maintain without hazard, nor abandon without dishonour. It is in order to guard against the occurrence of such a dilemma, that the law of allegiance has here been mentioned, and a seasonable relaxation might make it more consonant to natural equity, more easy of execution, and not less efficient for the preservation of our security, dignity, and independence.

6. The *indissolubility of marriage* is perhaps as much entitled to attention as the indissolubility of allegiance. The Common Law of England declares marriage to be indissoluble, while the legislature dissolves it by a private act of parliament in every case where the adultery of one of the parties and complete innocence of the other is satisfactorily established. Difficulty is sometimes experienced in obtaining an act at the instance of the wife, but never at that of the husband. A dispen-

sation from the ecclesiastical law is by means of a private act of parliament granted to every innocent man who is furnished with three or four hundred pounds to defray its charges. If this is not the case, the conduct of the legislature must be corrupt as well as unreasonable; for if it is capricious in the dispensation of these private acts, and refuses to one what it grants to another, such a circumstance would only make this anomalous jurisdiction so much the more exceptionable. The law and the church are thus ranged on one side, and the king and the two houses of parliament on the other; the one constantly and avowedly sanctioning a transaction which the other religiously forbids. Can this be a state of things which it is desirable upon any principle of justice or expediency to continue? So remarkable a contradiction between law and usage is almost unparalleled in the history of any country. A law which is regularly suspended must soon cease to have the sanction of a law at all, and no encouragement ought to be given to a regulation which is so partial and exclusive. If a dispensation from the law can be obtained by the higher classes of society, why ought it not to be equally accessible to the lower? A law that is unequal must necessarily be unjust, and one can hardly conceive how our present practice can be rescued from such an accusation. Let it be explained and palliated as it may, it remains utterly indefensible either with respect to principle or practice. The law which governs the contraction and dissolution of marriage, is not one which is

rarely called into operation, but exercises an influence the most extensive and important of all others upon social life, and affects the character and happiness of the lowest subject as deeply as that of the highest. Why then should not its provisions equally apply to all? And what evil would follow if some jurisdiction were created by which marriage could be dissolved regularly and absolutely with more facility? Like the objections urged against many other alterations, they lose a great part of their force the instant they come to be distinctly stated and examined. Upon the wealthy it would have no effect at all, because there is probably no instance of the expense of a private act of parliament having precluded an opulent individual from claiming that redress from the House of Lords which a less expensive tribunal would have accorded. Upon the lower ranks of the community it would be equally little, unless it happened that divorces would increase until the frequency of them became alarming. But in the first place, the allegation that this multiplication would ensue, is mere gratuitous assumption. Such a contingency might be denied with the same confidence with which it is asserted, and with the same degree of reason. But even if divorces should multiply, that effect would by no means amount to conclusive evidence that the alteration of the law was either detrimental to private morals or the public good. Though actions on account of adultery were multiplied twenty-fold, that would not prove that the crime

of adultery was increasing. The virtual exclusion of such cases from courts of justice is no proof either of their non-existence or infrequency. It is not by such a test that we judge of the morality of other countries, or that well-informed persons in other countries will judge of ours. Let the actual condition of the lower orders of society be narrowly and extensively scrutinized, and it will probably be found that of all those upon whom the present law operates, that operation is to confirm the depravity of the greater number, and to consummate the misery of all the rest. It holds out no punishment to the first, and denies all consolation to the latter. Suppose a person of acute feeling and exemplary conduct, though moving in a humble walk of life, has the misfortune to have contracted marriage with a consort who has sunk into inveterate habits of irregularity or debauchery, it is contrary to every principle of justice which is engraven on the human heart, that all relief should be unbendingly denied to him, while it is graciously extended to another whom fortune has more highly favoured. Were the rich and the poor occasionally made to change places, it would then be seen with what selfishness, carelessness, and ignorance the business of legislation has too often been conducted. There can hardly be a stronger instance of this than the law now under consideration, as it seems liable to almost every objection which can be stated to a public enactment. It unnecessarily multiplies legal proceedings by requiring one trial in the ecclesiastical

court to obtain a divorce *a mensâ et thoro*, and another in the House of Lords before they pass the bill for a divorce *a vinculo matrimonii*: it in effect establishes two laws of marriage in the same country, one for the rich and another for the poor: it requires a new act for each particular case instead of a general enactment for all: And it converts one branch of the legislature into a court of morality, in cases where from the rank and fortune of many of the parties who come before it, the acts as well as wishes of many of its members cannot fail to be swayed by personal and political feelings, instead of being governed by the uncompromising principles of justice. On all these grounds it seems desirable that the law of England should adopt more general and decided rules with respect to divorce than it has yet done, as well as point out a simpler method of procedure for obtaining the benefit of their application.

7. The last imperfection which shall be alluded to, consists in that departure which has too often taken place in courts of Common Law, from the strictness of established legal rules, as well as from the letter of acts of parliament. So fully aware was Justinian of the inconvenience of judges deviating from the literal meaning of legislative enactments, that he has prohibited this license in the strongest language. “*Illud autem*
“*quod statim cum hanc compositionem legum*
“*congregare mandaremus, jussimus: iterum et*
“*nunc sancimus illud confirmando: omnibus si-*
“*militer interdicemus, ne quis audeat hominum*

“ qui sunt nunc aut in posterum erunt, commen-
 “ tarios scribere harum legum, præterquam si velit
 “ quis in Græcam linguam hæc transferre, quem
 “ etiam volumus sola secundum pedem, seu *κατα*
 “ *ποδα* nuncupata uti legum interpretatione: et si
 “ quid secundum nominatorum paratitlorum adscri-
 “ bere voluerint usum: aliud autem nihil omnino,
 “ ne tantillum quidem circa ea facere, nec rursum
 “ dare seditionis et dubitationis aut infinitæ multi-
 “ tudinis legum occasionem. Si quid enim forte
 “ ambiguum fuerit visum vel litium certatoribus
 “ vel his qui rebus judicandis præsent, hoc Impe-
 “ rator interpretabitur recte: nam hæc facultas
 “ illi soli legibus permissa est.”* This power
 has, however, been more or less exerted, under
 every system of judicature, and has been largely
 assumed in the Common Law of England, where
 it could least of all have been expected to find
 a footing. The judges avowedly hold that
 private acts of parliament may be overruled by
 usage,† and the provisions of public acts have also
 been dispensed with,‡ disregarded,|| and evaded.§
 In some cases, as in the limitation of actions for
 simple contract debts, they have superseded
 some acts of parliament entirely, and rendered
 an important provision of the legislature almost

* Præfat. Digest. ed. Gothafred, p. 62.

† 2 Brown's Parl. Cases, 492.

‡ Carthew, 283.

|| Phillips on Evidence, p. 530, and Cases.

§ The King v. Shackell in the Court of Exchequer in 1823, not yet reported.

wholly nugatory.* Notwithstanding the implicit deference which all judges profess to yield to authority, some of the best ascertained maxims of common law have in the same manner been modified, abandoned, and exploded.† The cases in which this has happened are scattered over the whole surface of the law, and create a degree of doubt and uncertainty which never could have arisen, if those who preside in the Common Law courts had rigorously adhered to antecedent authorities, legislative or judicial.

That jurisdiction which courts of Common Law have arrogated, in controuling, superseding, or evading legal doctrines and acts of parliament, is equally unwarranted in principle and inconvenient in practice. Known and received doctrines, whether expedient or inexpedient, are as much a part of the law of the land as acts of parliament themselves, and as long as it is part of the law of the land that acts of parliament can never go into desuetude, so long are Common Law judges bound to carry them into full effect, according to their plain and genuine signification. If the enforcement of these acts or doctrines counteracts or impedes the ends of justice, those who feel aggrieved ought to betake themselves to courts of equity, or the law itself ought to be corrected by the legislature. But with such considerations

* 4 East's Reports, 599 and 604. *Ib.* v. xvi. p. 420. 5 Maule and Selwyn's Reports, 75. 3 Barnwell and Alderson's Reports, 141.

† 1 Salkeld's Reports, 122, and Cases there quoted.

Common Law judges have no concern. Their province is to expound the law, not construct it. While they scrupulously adhere to this prescribed line of duty, they never can be far mistaken; but the smallest deviation from it necessarily allows every judge to determine for himself the extent to which that deviation may be carried. In this way they advance step by step, until their error becomes manifest both to themselves and others. From this point, therefore, they take the first opportunity to recede, and their retreat usually continues, until they resume the precise position from which they originally started. A variety of important doctrines are thus subjected to perpetual ebbs and flows, which are the source of most of those inconsistencies and anomalies which it would be so desirable to rectify at present and prevent in future.

SECTION VII.

On the Doctrines of Courts of Equity.

FEW facts are now on record respecting the origin and progress of Courts of Equity, and a detail of those which remain, would in this place neither be deemed interesting nor appropriate. It seems sufficient to mention, that by far the largest portion of their jurisdiction, however strengthened by time and consecrated by utility,

rests upon no other foundation than the power which the distinguished persons who have successively been placed at their head, have administered according to the best of their judgment, and under the responsibility attaching to their exalted office. Almost all tribunals will be found more or less to have enlarged their own jurisdictions, but it is believed none are to be found who have pushed this amplification so far as courts of Equity in this country. When we are told that our present system of equity was begun by Lord Nottingham and completed by Lord Hardwicke, the inference which plainly and unavoidably arises is, that they together with the Lord Chancellors who filled up the space between them, ought to be ranked among the greatest legislators that have ever lived in England. The origin of the system, taking into consideration the circumstances under which it took place, is neither dishonourable to them nor to it. Still it is desirable that this origin should not be forgotten, as it is difficult to perceive why the same power which built it up at first, should not be permitted under prudent limitations to correct and enlarge it afterwards. Lord Hardwicke says, “ The tribunals of this kingdom are
“ wisely formed both of courts of law and equity,
“ and so are the tribunals of most other nations;
“ and for this reason there can be no injury but
“ there must be a remedy in all or some of them;
“ and therefore I will never determine that frauds
“ of this kind are out of the reach of courts of law
“ or equity, for an intolerable grievance would

“ follow from such a determination.”* A principle of this sort, governed by such occasional, general, or particular instructions, as the legislature may think fit to issue, seems indispensable to the prosperity of courts of Equity when disjoined from courts of Common Law, and ought to be extended to the relief of every class of wrongs which spring up in the country in which they are established. The jurisdiction of courts of Equity at the establishment of the Chancellor’s Equitable Court in the time of Richard II. was probably extremely circumscribed. Lands and the produce of them then constituted almost the only species of wealth; the actions which arose respecting them, though often of extreme nicety, usually turned on a few isolated points; and to the determination of these the courts of Common Law were fully competent. The subjects which then came properly under the cognizance of courts of Equity extended at first probably only to cases of fraud, and subsequently to trusts, when trusts under the denomination of *uses* grew common. As riches increased, and the rights, interests, and transactions of individuals became numerous and interwoven, the difficulty which was experienced in trying in the courts of Common Law the disputes which grew out of them, gradually led the suitors more and more to courts of equity, in which tribunals almost all questions relating to property of large amount are now ultimately determined.

* 2 Atkins’ Rep. 406.

Constituted as courts of Equity and Common Law have long been, this is the natural course of events, and it would not be wise to coneract it. Courts of Common Law were not intended, and are not calculated for the dispatch of that species of business with which courts of Equity are conversant. They could neither arrange the parties, balance their interests, protect and manage property, frame decrees, order references and inquiries before decrees are drawn up, nor hear causes upon further directions afterwards. They are utterly destitute of the machinery requisite for such a purpose, and could not easily be provided with it. It is for this reason that *a bill for an account* is brought in courts of Equity instead of *an action of account* raised at Common Law: that a bill is also brought in Equity for the recovery of any particular thing instead of an action of *detinue* at Common Law: that *legacies* are always sought to be recovered in Equity though courts of Common Law have a concurrent jurisdiction: and that courts of Common Law never make a decree for the specific thing contracted for, but for such a sum as may be an indemnification for the non-performance of the contract. In this last instance courts of Common Law and Equity have completely changed places. Natural justice requires that the law should give to a suitor the identical thing he has contracted for, and if this should be productive of extraordinary hardship, the defendant should then ask a court of Equity to relieve him from the obligation where it may be

thought equitable, upon payment of a compensation. The inversion of this order may have been in some degree accidental at the outset; but convenience has continued it, and would not now permit an alteration. In the cases here specified, the inability of courts of Common Law to administer substantial justice, either from want of original jurisdiction or the nature of their constitution, force the suitors to apply elsewhere for an effectual remedy. They usually betake themselves to courts of Equity, which are forced to discharge the duties thus devolving upon them, conformably to the doctrines which antecedent practice and decisions have established. Most of these doctrines essentially considered are commendable. The expense and delay which are incurred before the benefit of them can be obtained, may be both unnecessary and excessive; but the doctrines themselves will, when closely examined, be found in the main to be just and laudable. While the general tenor of the doctrines of Equity fully merit this acknowledgment, it cannot on the other hand be denied that to the general rule there are a considerable number of exceptions. The maxims by which the judges who framed the doctrines of Equity have been governed, have not always been either clear, comprehensive, or consistent. Overborne on some occasions by their desire to do justice in an individual instance, and hesitating on others either about the extent of their jurisdiction or the consequences of its exercise, the general stream of their decisions shews alternate

errors both on the side of boldness and timidity. As the mistakes which spring from timidity would perhaps be better corrected by remedial or declaratory acts, similar to those which shall be afterwards mentioned, than by an unseasonable resumption of antiquated authority, those which are now about to be mentioned, shall be confined to those instances where it may be doubted whether the jurisdiction which courts of Equity have precipitately assumed might not be advantageously abrogated or surrendered. They appear to have arisen chiefly in three cases: in the case of favoured classes of persons; in relieving against apparently oppressive legal rights; and in the evasion of beneficial statutes.

1. The classes of persons to whom favour is principally shewn, are *infants*, *expectant heirs*, and *charities*. The privileges given to infants in courts of Equity are both numerous and material. If a bill is filed to which it is necessary to make an infant a defendant, the infant is not obliged to put in an answer himself till the expiry of his infancy; and no exception can be taken to the answer, however manifestly erroneous or defective, which is put in during his infancy by his guardian or next friend on his behalf. If an infant is a plaintiff in a bill, he is as much bound by the decree as if he were of full age;* but no decree can be made against an infant if he happens to be a defendant, to which he has not the power of ob-

* Atkins's Rep. 531.

jecting after the termination of his infancy.* The court acts for the benefit of an infant without regard to the prayer of a petition, which it does in the case of no other person.† If he is a mortgagor, the foreclosure is not complete till he attains twenty-one;‡ and in the case of the execution of deeds, as for a partition of lands, the conveyances cannot be executed till he comes to the age of discretion.§ If lands are devised by will for payment of the testator's debts, and it should happen that the person to whom the residue is devised is an infant: or if a creditor by bond institutes a suit for the purpose of having the bond paid out of the real estate of the debtor; in both these cases, if "the parol demurs," that is, if the infant thinks proper through advice or spontaneously to avail himself of his privilege of infancy, the estate cannot be sold till the infancy determines, though that should be ten or fifteen years afterwards.|| All these cases occasion more or less inconvenience, and to legatees and creditors are often productive of the severest hardship. The protection and redress of infants is certainly one of the most sacred duties which the chancellor and other equitable judges who represent the *parens patriæ* in his courts of Equity,

* 2 Maddocks' Eq. 460.

† 10 Ves. 59.

‡ 18 Ves. 83.

§ 2 P. Williams's Rep. 518.

|| 7 Ves. 211.—2 Cox's Rep. 386.—2 Atkyns's Rep. 531.—3 P. Williams, 368.

are required to perform; but it is not unworthy of consideration whether the privileges which infants now enjoy might not be circumscribed with great advantage to themselves and all other members of the community.

Heirs form another class of persons whom courts of Equity regard with peculiar favour. Though a will has been executed, which there is every reason to believe is perfectly valid, depriving a remote heir of an estate, and disposing of it among the testator's near relatives and connections; yet if the heir has by any contrivance got into possession of the estate, although the legatees should immediately file a bill and proceed to establish the will, however questionable the title of the heir seems here to be, the court will take no step either to recover the possession or protect the property. The heir has the uncontrouled management of it, and though he remains personally liable for his actions, he may cut down timber, or commit any other act of waste, without restraint, until the title is determined.* In the case of *expectant heirs*, this favour is still more unequivocally demonstrated. In all disputes arising between expectant heirs and those who have dealt with them for interests of which they were not in actual possession, the expectant heir is not required to shew that the bargain was unconscionable, but those who dealt with him are bound to shew its reasonableness; and unless this be done, the expectant heir is relieved from the performance of

* 8 Ves. p. 89.

the contract. This is the established rule by which courts of Equity are guided, and it extends to all expectant heirs without respect to age, capacity, or experience; and to agreements of every description by which a future interest is exchanged for a present benefit.* The principle upon which courts of Equity proceed in these cases is, that the necessities of the expectant heir compelled him to enter into agreements, of which it would be contrary to good conscience to allow the person who dealt with him to take advantage. However amiable the love of justice always is, it is here deplorably misdirected. Had the earlier Equity judges possessed the prescience and comprehensive views of their successors, such a principle never would have been promulgated.† It is unsound in itself, detrimental to the very objects of its intended kindness, and if it were pushed to its utmost legitimate limits, would bring one half of the transactions in the country into question. The period of full age might be postponed to a later period in life, or all dealings for future interests might without exception be declared void, provided either of these alterations should be reckoned salutary; but the moment an expectant heir is permitted to have the complete management of his own affairs, he has no more right to be protected in his dealings with other persons, than other persons have to be in their dealings with

* Maddocks' Equity, v. i. p. 117—123.—2 Swanston's Rep. 139, and Cases.

† 2 Brown's Rep. 179.—2 Swanston's Rep. 139.

him. If fraud or surprise has been practised, that circumstance furnishes a separate and sufficient ground of relief, but neither he because he is an *heir expectant*, nor other heirs because they sustain the character of *heirs at law*, seem to be entitled to any privileges or immunities which do not belong to other parties who are forced into a court of justice.

Charities are also favoured in Equity, both in their establishment at first, and in the proceedings instituted on their behalf afterwards. It may be doubted in the first place, whether equity is not too much disposed to give effect to charitable purposes though expressed in an extremely loose and indefinite manner.* If the intention is ascertained to be charitable, it is carried into execution, though the mode of carrying it into execution which has been expressed by the testator is either impracticable or illegal. “If the mode becomes impossible, the general object, if attainable, shall not be defeated.”† “If it were *res integra*,” Lord Chief Justice Wilmot has said, “much might be said for the heir at law; because in every other case, if the testator’s intention in specie cannot take place, the heir at law takes the estate. And as the motive inducing the disinherison in a charitable devise, is a passion for that particular charity which he has named, if that particular charity cannot take place. *Cessante*

* See Cases, 2 Maddocks’ Equity, p. 71 and 72.

† Vesey’s Rep. 144.

“ *causa, cessaret effectus*. The right of the heir at law seems to arise as naturally in this case as in any other. But instead of favouring him, as in all other cases, the testator is made to disinherit him for a charity he never thought of; perhaps for a charity repugnant to the testator’s intention, and which directly opposes and counters the charity he meant to establish. But this doctrine is now so fully settled, that it cannot be dissented from.”* At one time this doctrine of *cy pres* or *approximation* was carried to an extent both ludicrous and alarming. Robert Mayot, a beneficed clergyman of the church of England, bequeathed 600*l.* to be distributed by Mr. Baxter “amongst sixty pious ejected ministers;” and adds, “I would not have my charity misunderstood. I do not give it them for the sake of their non-conformity, but because I know many of them to be pious and good men, and in great want.” The charity was adjudged void, and the money decreed for the maintenance of a chaplain for Chelsea College.† In another case a Jew set apart a fund of 1200*l.* and desired the revenue of that sum to be applied towards the establishment of a Jesuba, or assembly for reading the law, “and instructing people in our holy religion.” The King and the court of Chancery between them, disposed of it for the benefit of the Foundling Hospital, an in-

* Wilmot’s Judgments and Opinions, p. 32.

† 1 Vernon’s Rep. 247.

stitution which may be extremely useful in its way, but bearing as little resemblance to a Jesuba as can be well imagined.* In times comparatively recent, Lord Rosslyn mentions another which occurred in his own experience. He says, "In a case before me, the testator directed bread to be distributed to four persons attending divine service, and chaunting his version of the psalms. They could not be chaunted, because not authorised; but I thought his general object was to give the poor people the bread, and the chaunting the psalms was only accessory, because he thought his version as good as any other."† The special facts which were adduced in evidence may possibly have justified his Lordship's judgment; but as far as he has here thought proper to detail them, no case could well be conceived in which the opinions of the poet and the poor people about *principal* and *accessory* were likely to be more at variance. The disposition of the present judges certainly is rather to confine than enlarge the operation of this doctrine; but it may be doubted whether its limits have yet been sufficiently restricted. Besides being indulged in their constitution, charities are favoured in almost every state of the suits which are instituted in courts of Equity where they are concerned. They are favoured with respect to defects in the prayer of the bill, defects with respect to parties, and irregularity

* Ambler's Rep. 228.

† 2 Vesey, jun. 388.

with respect to the decree and general proceedings.* One does not readily perceive why all these instances of kindness should be shewn to them which are denied to other parties. Indeed the whole subject of charities well deserves investigation, both as it concerns the public, the heir or next of kin, and the reasonableness and consistency of the rules according to which this branch of the jurisdiction of Equity is administered.

2. Another point in which courts of Equity have incautiously overstepped their proper limits, is by depriving parties of legal rights, or relieving them against the effect of legal obligations. One of the most frequent cases in which this occurs, is by giving time for the performance of a contract, or the payment of money into court. Lord Rösslyn says, “ The court had been for some time “ very large upon this, and there was one case “ before Lord Thurlow from which my opinion “ revolts; but in *Whittaker v. Whittaker* it appears that Lord Kenyon, upon the bill of the “ vendor, either to have the contract completed, “ or to be relieved from it, recalled the true rule, “ holding that the vendor was not to wait the arrangement of the testator’s affairs, and directing the contract to be delivered up.”† There is sound justice in the alteration of the rule, which still remains susceptible of improvement. Delay is always inconvenient, generally injurious, and

* 11 Vesey’s Rep. 217, 366. † 5 Vesey, 736.

sometimes fatal to one or other of the complaining parties. Compassion and their own interest almost always prompt suitors to exercise sufficient forbearance and indulgence to one another, and the less courts of Equity interfere in private arrangements of this nature, the public interest will be the more effectually consulted. They seldom have it in their power to do more than shift the grievance, and generally end in leaving it upon the shoulders of the wrong party. A second instance in which courts of Equity have exceeded their powers, is in restraining the Common Law rights of tenants in tail *without impeachment of waste*. The court foresaw the evil, and yet unfortunately did not guard against it. Near eighty years ago it was observed by Lord Hardwicke, "That if a son should have it in his power " to call his father into a court of Equity for " every alteration he makes in a walk or an " avenue, it would be such a fund of dispute between them that there would be no end of it, " and it would be better for the public that Raby " Castle had been pulled down than that the pre- " cedent had been made."* Were Lord Hardwicke now living he would see that the Court had involved itself in the very difficulties he had deprecated. There is no end of the questions which arise about *ornamental timber, husbandlike management, and wilful, destructive, malicious and extravagant waste*, nor is it possible to discover any

* 1 Vesey, 522.

rational and determinate rules by which they ought to be decided. Lord Eldon has declared, “ When this court took upon itself to depart from “ the rule of law as to waste, and interpose its “ restraining power upon what is called equitable “ waste, one duty at least was imposed upon it: “ to define with precision and accuracy in what “ cases the court would interpose, and to take “ great care that in the terms of its injunctions a “ language should be adopted, that might be “ clearly understood by the parties, whose rights “ were to be bound at such peril as that of disobeying an injunction of this court. But the court “ has at all times adopted language exceedingly “ difficult to be understood. In arguing cases “ of this sort I have been asked from this place “ what I meant by *thriving timber*, *timber-like trees*, “ and *ornamental timber*, and I have not been able “ to give any further answer than by referring to “ the language of the court in former instances.”* No argument could exhibit the principles of the court on this subject in a more unfavourable point of view, or more clearly demonstrate that they stand in need of remedy.

Another point in which courts of Equity have exceeded their proper jurisdiction, is by interfering too much with those rights technically termed *powers*, which are so frequently acquired or reserved by some of the parties to a deed

* 6 Vesey's Rep. 109. 4 Vesey, 785. 5 Vesey, 367. See cases collected 1 Maddocks' Eq. 313.

or agreement upon its execution. Courts of Equity have aided the *defective execution* of these powers, and controuled their exercise in cases where appointments made under them appeared to be *illusory*, much farther than a sound view of equitable interference will be found to warrant. Upon the defective execution of powers Sir William Grant has delivered the following opinion.

“ It is difficult, therefore, to discover a sound principle for the authority this court assumes for aiding a defective power in certain cases. If the intention of the party possessing the power is to be regarded, and not the interest of the party to be affected by the execution, that intention ought to be executed whenever it is manifested; for the owner of the estate has nothing to do with the purpose. To him it is indifferent whether it is to be exercised for a creditor or a volunteer. But if the interest of the party to be affected by the execution is to be regarded, why in any case exercise the power, except in the form and manner prescribed? He is an absolute stranger to the equity between the possession of the power, and the party in whose favour it is intended to be executed. As against the debtor it is right that he should pay. But what equity is there for the creditor raised out of the estate of a third person, in a case in which it was never agreed that it should be raised? The owner is not heard to say, it will be a grievous burden, and of no merit or utility. He is told the case provided for exists: it is for-

“ mally right : he has nothing to do with the pur-
 “ pose. But upon a defect, which this court is
 “ called upon to supply, he is not permitted to
 “ retort this argument, and to say it is not formally
 “ right ; the case provided for does not exist, and
 “ he has nothing to do with the purpose. In the
 “ sort of Equity upon this subject there is some
 “ want of equality ; but the rule is perfectly set-
 “ tled ; and though perhaps with some violation of
 “ principle, with no practical inconvenience.”*
 Though there may be no inconvenience here, it is
 seen very perceptibly in other instances. As it is
 not all defective executions of powers that are
 aided, but only those to the execution of which
 the person who has inaptly executed the power is
 bound by valuable consideration, the difficulty of
 determining whether a consideration ought to be
 held *valuable*, will here be found to recur. It is
 impossible to divine why some sorts of what are
 in Equity termed *valuable considerations*, and parti-
 cularly that of *natural affection*, is made to extend
 so far, or why it should not have been extended
 a great deal farther. It does not extend to a wife
 in favour of her husband, nor to a natural child, nor
 grandchild, nor brother nor sister, nephew nor
 cousin.† The difficulty of settling either the grounds
 or limits of equitable interposition in these cases
 becomes still more obvious, in cases where a pa-

* 7 Vesey's Rep. 506. 15 Vesey, 51.

† 1 Mad. Rep. 516. 3 Ves. 244. Pre. Ch. 475. 5 Ves. 567.
 6 Ves. 544. 1 Ves. 228. 3 Atk. 189. 2 Ves. 621. 3 Br. 170.
 2 Ves. 582.

rent or other person has a power of dividing a sum of money among his children. Courts of Equity then arrogate the power of preventing the parent from excessive irregularity in the distribution, and of depriving any of the children of what might be thought their due, by giving them a share which is merely illusory. Sir William Grant has unequivocally expressed his dissatisfaction with this stretch of jurisdiction. “ It is impossible to have considered a case of this kind with a view to its decision, without wishing, that judges in Equity had either never assumed control over the execution of discretionary powers, or had laid down rules by which their successors might be guided in the exercise of that jurisdiction. To say that under such a power an illusory share must not be given, or that a substantial share must be given, is rather to raise a question than to establish a rule. What is an illusory share, and what is a substantial share? Is it to be judged of upon a mere statement of the sum given, without reference to the amount of the fortune, which is the subject of the power? If so, what is the sum that must be given, to exclude the inference of the court? What is the limit of amount at which it ceases to be illusory and begins to be substantial? If it is to be considered with reference to the amount of the fortune, what is the proportion, either of the whole, or of the share; that would belong to each upon an equal division? In terms, the power, though limited as to objects, is discretionary as to

“ shares. A court of law says, no object can be
“ excluded: but there it stops. It does not at-
“ tempt to correct any, the extremest inequality
“ in the distribution; and yet if that is a fraudu-
“ lent execution of the power, why is it not void
“ at law? a fraudulent act has no more validity
“ in a court of Law than in a court of Equity; and
“ if it is not a fraudulent execution, upon what
“ principle does a court of Equity deny its effect?
“ It is sometimes said this court interferes for the
“ purpose of carrying into effect the intention of
“ the party creating the power, who must have
“ meant that each object should derive the same
“ real benefit from the execution of the power.
“ Now every instrument must receive the same
“ construction from every court. Whatever is its
“ true meaning must be its meaning every where.
“ If then the true meaning of the power, however
“ discretionary it seems, be, that each object shall
“ have what is called a substantial share, it is not
“ executed according to its true meaning, and
“ therefore is not well executed by an appointment
“ that does not give to each object a substantial
“ share. A court of Equity may in the exercise
“ of its own particular jurisdiction supply defects
“ in the execution of a power. But I cannot un-
“ derstand how the question, whether a power is
“ well or ill executed, can receive different deter-
“ minations in different courts. If it is not exe-
“ cuted according to its true import how can
“ a court of Law say it is well executed; and if
“ it is executed according to its true import,

“ how can a court of Equity say it is ill executed?” He afterwards concludes the judgment thus, “ So in reality the court keeps itself in a state of constant embarrassment, and those who have such powers to execute in perpetual uncertainty, without aiming at any object of the least importance. If the thing to be secured was a sufficient provision for every object of the power, then the attention of the Court would be directed to a substantial object. But as it is, the interference of the court is only to determine whether a few pounds more or less shall leave it within, or take it out of the rule. If I determine that this is illusory, the next person having such a power to execute, will add a few pounds, and make the experiment upon another sum. How far is the court to go? Is it to go from sum to sum, and from step to step, till at last it gets up to what is an adequate provision? If so, it is infinitely better for the court to avow that object, that parties may know how to execute powers.—With this opinion of the rule, it is impossible not to feel the disposition of Lord Alvanley to get rid of it altogether. But I am not authorised to act upon that disposition. I am bound to follow the precedents as far as they have gone. But having no principle to guide me, I cannot go a step further.”*

* 9 Vesey's Rep. p. 393.

It is also disputable whether courts of Equity have not also indulged judicial discretion too much in the suits which have occurred respecting the powers of granting leases which are enjoyed by the tenants for life of entailed estates. On this subject it may be sufficient to allude to the two recent cases of the Jersey and Queensberry leases, as the whole doctrines on the subject have there been laboriously discussed and collected.* The first of these was an appeal from a Common Law court to the House of Lords. And as the twelve Common Law Judges were equally divided on the first occasion on which they were called in to assist the House of Lords with their opinion, and only one of them changed his view of the point on the second, it may almost be assumed, upon looking at the reasons given for the final judgment, that the Chancellor alone reversed a Common Law judgment upon Equitable grounds, and that too in a case where courts of Equity could have afforded relief, provided the party had proved himself entitled to it.† By the judgment in the Queensberry leases, the interference of Equity with the strict legal rights of tenant for life, was first established or renewed in another country. Both decisions are likely to remain the subject of interminable doubts and discussions. With regard to the whole subject of *powers*, courts of Equity

* 10 Vesey's Rep. 68.

† 1 Taunton and Broderip's Rep. p. 97. and 5 Dow's Rep. p. 297. and 1 Bligh's Rep. 339. Sugden on Powers, p. 610. ad finem.

ought to interfere with them with extreme reluctance. If any description of *powers* are either confined too much or too little, let them be enlarged or contracted; but as long as they remain unchanged, it will eventually prove most expedient for courts of Equity to permit every individual who is entrusted with them to exercise them at his own time and in his own way.

Courts of Equity have been equally unsuccessful in interfering with the right of *executors* to the undisposed residue of a testator's estate, which the Common Law gives them. The anxiety of courts of Equity to effectuate complete justice has here again misled them. Perceiving in some cases, either that a testator had anticipated no residue, had accidentally omitted to dispose of it, or had used some words or phrases in the will which made it doubtful whether he intended the *executors* to have it, they have introduced parol evidence to explain the will, which innovation has introduced evils which have since been deeply felt and complained of. "I have," says Lord Alvanley, "taken
" the more time on account of a doubt suggested
" by a learned Judge with respect to the admission
" of parol evidence. No man has a greater regard
" than I have for his decisions and his doubts, and
" I should have been glad to have found myself
" warranted to hold parol evidence not admis-
" sible. No man sees the danger or feels the
" inconvenience of admitting it more; but I have
" carefully looked into all the cases: they are so
" numerous, that it is a disgrace to the court.

“ There are near fifty in print upon this point.”* Even in the total absence of parol evidence, the refusal to give the executors the residue where it is not clearly given to some other persons, has given rise to such endless discussions and decisions about the testator’s presumed intention, that it has afforded a subject of lamentation to almost every judge who has sat in Equity during the last eighty years.† These questions have been called “ a perpetual fund for the courts “ since the rule of law has been deviated from.”‡ We are informed by Sir J. Strange “ That a “ bill was brought in by Lord King to settle this “ matter, which did not fail on any particular reason, but unfortunately there was a difference between the two Houses, and this was thrown out “ by way of reprisal; for,” adds he, “ I well “ remember the history of it.”§ The neglect to revive so useful a measure does no great honor to Lord King’s successors, and it is to be hoped that one of a similar nature will soon be again introduced into Parliament, and attended with a more successful issue.

Next to the interference of courts of Equity with the Common Law rights of executors to the

* 2 Vesey, jun.’s Rep. p. 474.

† See a vast variety of cases collected in Maddock’s Equity, v. ii. p. 97—107.

‡ 2 Vesey’s Rep. 94. 166. 2 Peere Williams, 340. 4 Brown’s C. C. Rep. 251. 1 Ves. 277.

§ 2 Vesey’s Rep. 166.

surplus, comes their interference with the Common Law rights and duties flowing from the relation of husband and wife. A disposition has lately been evinced to exempt altogether the separate property of married women from all general demands against them.* Whether this doctrine may ultimately be approved or not, it is indisputably settled that whenever courts of Equity assist the husband to recover the effects of the wife, and there has been no settlement at all on the marriage, or one which is deemed insufficient, they compel the husband to execute either an original or additional settlement, as the case may happen. The doctrine is laid down by Lord Hardwicke with much precision. "This court," says he, "according to the power it exercises, and the care it always takes of the interest of *feme coverts*, will either where there is no provision at all for the wife, on money coming to her, oblige the husband, before he is permitted to touch it, to make some provision for her; or where there is a slender provision only made before, on an accession of fortune to the wife, if it be considerable, oblige the husband to make a further provision."† This is the rule, if the assistance of courts of Equity is required. But if the property of the wife is in the hands of a trustee, if that trustee should pay it over to the husband when requested, the receipt of the husband is held by courts of Equity to be a sufficient discharge to

* 3 Maddock's Rep. 79 & 387. But see 1 Vern. 326.

† 3 Atkyns's Rep. 720. 2 P. W. 639. 3 P. W. 205.

the trustee to all intents and purposes whatsoever. It is thus made to depend entirely upon the will and pleasure of the trustee, whether the wife shall be deprived of a settlement, or enjoy it. It is also in the power of the husband to assign some, but not all, *expectancies* of his wife for a valuable consideration, without limitation or controul.* In no case is the wife's property bound where she survives the husband, unless it has been *reduced into possession*; and if he becomes a bankrupt, his assignees, in order to entitle themselves to any aid from courts of Equity, must consent to make a settlement upon the wife proportioned to its value.† Courts of Equity, and even courts of Common Law, have also from laudable, but perhaps mistaken motives, been prevailed upon to confirm contracts for the voluntary separation of husband and wife. If the contract is made directly between husband and wife, it is admitted to be invalid; but if the transaction is effected by means of trustees, the husband covenanting to pay them a certain annual sum, and they covenanting for that sum to indemnify him against the debts of his wife, it is then held that the agreement is effectual. Lord Ellenborough has observed, with allusion to the practice of courts of Common Law, "The question which has been
" agitated, appears to have been laid at rest for a
" long period by repeated decisions, and the

* 2 Atkyns's Rep. 207, & 549. Vesey's Rep. v. ix. p. 99.
2 Mad. Eq. 16.

† 9 Vesey, 99.

“ uniform decisions of the courts. If it were now
 “ a new question, whether any contract could by
 “ law be made which tended to facilitate the se-
 “ paration of husband and wife, I should have
 “ thought that it would have fallen in better with
 “ the general policy of the law to have prohibited
 “ any such contract. But they are now become
 “ inveterate with the law, and we cannot reject
 “ the present on that ground, without saying that
 “ all contracts which have the same tendency are
 “ vicious ; which would extend for aught I can see
 “ to provisions for pin-money, or any separate
 “ provision for the wife which tends to render her
 “ independent of the support and protection of
 “ her husband.”* In courts of Equity I conceive
 it still to be the rule that such contracts may be
 carried into execution,† though Judges in Equity
 have strongly doubted the foundation of their own
 jurisdiction.‡ In speaking of the practice of Ec-
 clesiastical Courts in such cases, Lord Stowell has
 remarked,—“ These courts, therefore, to which the
 “ law has appropriated the right of adjudicating
 “ upon the nature of the matrimonial contract,
 “ have uniformly rejected such covenants, as in-
 “ significant in a plea of bar ; and leave it to other
 “ courts to enforce them so far as they may
 “ deem proper, upon a more favourable view (if
 “ they entertain it) of their consistency with the

* 2 East, 293.

† 3 Brown's Ch. Cases, 614.

‡ 3 Vesey, 352. 11 Vesey, 532.

“ principles of the matrimonial contract.”* The whole of these rules of Equity with respect to marriage seem to be laid down without any intelligible and comprehensive principle to guide or connect them. The execution of agreements between husband and wife for voluntary separation, whether with or without the intervention of trustees, ought in no instance to have been enforced either at Common Law or in Equity. Cases of great hardship must be expected occasionally to occur, but it is infinitely better for the domestic happiness of families and the general good of the public that they should remain unrelieved, than that any interference with such a sacred obligation should receive judicial countenance or encouragement. If either of the parties has given cause for instituting a suit, let the aggrieved parties apply to the Ecclesiastical Court, where such matters are properly cognizable; but if they do not think proper to do so, no other tribunal ought to alter the conditions of so intimate a union. The rights acquired by the husband ought to be as strictly and universally enforced as the continuance of the contract. If it is a good law therefore, that the husband should by virtue of his marriage become entitled to the whole personal property of the wife, one can see no principle which can authorise courts of Equity to make any stipulation with him about a settlement, as the price of their assistance. On

* 2 Haggard's Rep. 318.

the other hand, if it is fit that the husband's right should be restricted, and that where there is no settlement upon the marriage, the wife should not be divested of her property or expectations until a settlement is made ; there is no reason why this should not apply universally, whether he or his assignees get possession of it by his or their own power alone, or by means of Equitable interposition. On these topics it may be very difficult to determine what the law ought to be ; but when it has once been clearly and definitively settled by the Legislature, courts of justice ought to have little else to do than to carry its enactments into execution.

The last instance in which courts of Equity have assumed a questionable latitude, though it cannot strictly be said to amount to a relaxation of a legal right, is in permitting biddings to be opened at public sales of property conducted under the direction of the court. The prevailing opinion until lately was, that a sale of property made by authority of the court, might be disaffirmed at any time before the conveyance was actually completed, provided an advance of at least 10 per cent. was offered upon the preceding bidding.* Anxiety to dispose of the property to the greatest advantage for the benefit of creditors, legatees, widows and infants, has caused this course to be adopted, and little doubt was probably entertained that it would prove beneficial.

* 3 Maddock's Rep. 314.

“Hours,” says Lord Hardwicke, “should not be too strictly kept in sales of property under the direction of the court.”* Succeeding Judges have extended this principle, until the effect has been so prejudicial as to call forth the following explicit declaration from Lord Eldon :—“I believe that the rule of opening the biddings, which was intended to protect, has frequently been very pernicious to the interest of the suitors in this court, and that their estates have sometimes sold for next to nothing in consequence of it. But it is the practice of the Court, and it has been acted on in the case of persons who were present at the sale. That circumstance may perhaps be an objection, yet many cases might be put in which it would be impossible to act upon it as a general rule. Each case must be governed by its special circumstances: no general rule can be laid down one way or the other: but it is quite impossible to say that there is no case in which a person present at the sale shall open the biddings. The practice of the court cannot be altered by any Judge: it may perhaps, with reference to future cases, be necessary to consider the subject with the assistance of the Master of the Rolls and the Vice-Chancellor.”† Here the matter has ever since rested, and the observations which have been made serve no other purpose than to excite regret in the mind of the legal inquirer, that so large a portion of

* Atkyns's Rep. 202.

† 2 Jacob and Watkin's Rep. 348.

Lord Eldon's merit should be found to consist in the excellence of his unfulfilled intentions.

3. A third way in which courts of Equity have transgressed their legitimate bounds, is in *the evasion of beneficial statutes*. Courts of Justice, when expressing themselves in the abstract, invariably declare their resolution to adhere to the letter as well as spirit of acts of Parliament in their determinations, and yet there is nothing of which in practice they are more forgetful. "The statutes of Mortmain," says Lord Keeper Henley, "began with Magna Charta. I have heard the late Lord Chancellor go through them all, and conclude with saying, he thought they had been rendered ineffectual by the interpretation which had been put upon them by courts of justice. This is a melancholy hearing to the subject. For my part I will support the law as far as I can, without shaking things which are established."* There is scarcely one important act of parliament to which this observation will not apply, of which the *statutes for the prevention of frauds,—for registration,—for granting annuities,—the arbitration act, and the act creating literary property*, are alone sufficient to furnish abundant confirmation.

By 29 Charles 2. c. 3. commonly called "the statute of frauds," certain formalities are specified in order to make wills and agreements effectual. By the manner in which this act has been inter-

* 1 Cox's Rep. 18.

preted with respect to the *execution of wills*, its purpose has been almost entirely defeated. The same thing has happened with respect to *the execution of agreements*, which by the act are all required to be in writing. Courts of Equity have held, that if agreements have been in part performed, though they be only *parol*, they are withdrawn from the operation of the statute. It is not the least remarkable circumstance in this case, that almost every thing may become a part performance, except the advancement of money, the largest payment of which is regarded as no part performance at all.* The evasion of this act is so familiar to all who are conversant with courts of Equity, that it ceases to excite observation; but if the statute of frauds ought to be abrogated, it would be better to do so avowedly, than to perpetuate such a glaring contradiction between the law and the practice.

The object of the act *for the registration of deeds relating to real property* has been evaded by means of interpretation, fully as much as the statute of frauds. The 7 Anne, c. 20. which lays down certain regulations for the registration of deeds, conveyances, wills, and incumbrances which shall affect any lands or tenements within the county of Middlesex, enacts “that every
“such deed or conveyance that shall at any time
“after the said 29th day of September be made
“and executed, shall be adjudged fraudulent and

* See cases in 1 Maddock's Equity, 381.

“ void against any subsequent purchaser or mort-
“ gagee for valuable consideration, unless such
“ memorial thereof be registered as by this act is
“ directed, before the registering of the memorial
“ of the deed or conveyance under which such
“ subsequent purchaser or mortgagee shall claim;
“ and that every such devise by will shall be ad-
“ judged fraudulent and void against any subse-
“ quent purchaser or mortgagee for valuable con-
“ sideration, unless a memorial of such will be
“ registered at such times and such manner as is
“ hereinafter directed.” The effect of this pro-
vision seems to be, that an instrument duly
executed, but not registered, shall be held frau-
dulent and void against a subsequent one duly
executed, and also registered, according to the
provisions of the statute. This is the meaning
which the courts of Common Law have according-
ly attached to it, when they were lately called upon
for the first time, to put a construction upon it.*
Courts of Equity however, proceeding on the dan-
gerous and untenable principle of contrasting the
enacting part of a statute with its preamble, were
unwarily led to hold, that no person is entitled to
claim the benefit of the act against a prior unregis-
tered instrument, provided he or his agent has
had direct or constructive notice of its execution.
This decision has now been followed by so many
others, that though it has destroyed more than
half the utility of the statute, it is now too firmly

* 5 Barnewall and Alderson's Rep. 154.

fixed to be shaken.* There is scarcely a Judge of any eminence to be found who has not left some expression on record condemnatory of the principle on which it originally proceeded. Lord Hardwicke says, "What weighs principally with one, is "the great danger of overturning an act of parliament, and making it mere waste paper." And afterwards in that very case conclusively observes, "but what were acts of parliament for, "unless they were effectually observed."† Lord Camden thinks "if this were a new point, it might "admit of difficulty, but the determination in Bedford *v.* Bacchus seems to have settled it, and it "would be mischievous to disturb it."‡ When it was urged before Lord Alvanley "that it was "unfortunate the Court had departed from the "statute by admitting evidence of notice aliunde," his Lordship replied, "I regret the statute has been broken in upon by parol evidence."§ In the law of France, and in that of Scotland, no infraction of the rule has I believe taken place. The French parliaments gave irrefragable reasons for its rigorous observance. When the Chancellor D'Aguesseau proposed to promulgate a general Ordonnance respecting French entails, he proposed 45 different questions to each of the parliaments of France, on all of which he requested their opinion. The 33d article of the 2d title ran in the following terms:—"Le défaut de publication et

* See the cases collected 1 Maddock's Eq. 328.

† 2 Atkins, 275.

‡ Ambler, 680.

§ 3 Vesey's Rep. 384.

“ d'enregistrement ne pourra être suppléé, ni re-
 “ gardé comme couvert par la connoissance que
 “ les créanciers ou les tiers-acquéreurs pourroient
 “ avoir eue de la substitution, par d'autres voies
 “ que celles de la publication et de l'enregistre-
 “ ment: voulons que le présent article soit ob-
 “ servé, à peine de nullité.”* Had the law been
 observed with the same rigour here as in France,
 the principle would have been clear; it would
 have been understood by the whole community,
 and not one of the crowd of cases which are to be
 found in the books would have occurred to per-
 plex it.

The *Annuity Act* is another, which the train of
 cases that have been decided in courts of Equi-
 ty have substantially evaded. By the 27 Geo. 3. c.
 26. followed by 53 Geo. 3. c. 141. all annuities
 except those of which a memorial is enrolled in
 Chancery in the terms in these acts pointed out,
 are declared to be invalid. It would appear
 therefore that questions relating to the invali-
 dity of an annuity should have been left en-
 tirely to the courts of Common Law, and that
 unless one of the parties had complained of sur-
 prise or circumvention, courts of Equity ought not
 to have entertained the suit. Lord Alvanley has
 expressed his opinion without circumlocution.
 “ I confess,” he says, “ if the case of *Byne v.*
 “ *Vivian* had not been produced, I should have
 “ thought that upon this act the remedy ought to

* Œuvres D'Aguesseau, tom. xii. p. 476. 8vo. ed.

“ have been entirely at law, and the court ought
 “ not to have interfered : but that case does un-
 “ questionably furnish a precedent for the inter-
 “ ference of the court ; and in conformity I shall
 “ proceed to consider, how far, and to what ex-
 “ tent the plaintiff is entitled to relief.”* In con-
 formity to these cases courts of Equity have acted
 ever since, though almost every Judge who has
 had the subject under his consideration has
 regretted that any such precedents should ever
 have been furnished. The present Chancellor
 may be named among others, as he has both
 doubted the jurisdiction assumed by courts of
 Equity, as well as the wisdom of the act upon
 which the relief is administered.†

To the acts which have been evaded by the
 practice of courts of Equity, the 9 and 10 of
 William 3. c. 15. “ *for determining differences by*
 “ *arbitration*” may be added. Lord Hardwicke
 doubted upon this point very long ago. He says,
 “ I am and have been a good deal doubtful as to
 “ the nicety courts of law have used in determin-
 “ ing awards ; for they have formerly gone so far
 “ as to make it almost impossible for arbitrators
 “ to do what is the main object of the submission,
 “ the putting an end to differences between the
 “ parties.”‡ Doubts may still be entertained
 whether courts both of Common Law and Equity
 have not continued to indulge too much of this
 very nicety. It may be doubted whether they

* 5 Vesey's Rep. 617.

† 7 Vesey's Rep. 17.

‡ 2 Atkyn's Rep. 503.

have not indulged it too much with respect to almost every clause of the act—the manner of entering into the agreement to refer*—the matters which may be referred—and the grounds upon which an award may be set aside, whether proceeding upon a mistake of the arbitrators either with regard to law or fact.† The present tendency seems to be to revert to that strictness of construction from which it would have been better not to have departed.‡ It requires so much skill and experience to adjudicate correctly either according to law or natural justice, that arbitration will in no country be found to be the most satisfactory method of adjusting differences between contending parties. If ever arbitration happens to become popular, it may be regarded as an infallible indication that justice has from some cause or other ceased to be administered in the tribunals of Common Law or Equity, with a proper degree of cheapness, ability, integrity, and expedition. Inferior as a domestic forum generally is to a public one for the settlement of differences, and insufficient as the arbitration act may be to secure all the advantages which arbitration may be calculated to yield, still while it

* 1 Wilson's Rep. 129. 8 Term Rep. 139. 14 Vesey's Rep. 270.

† 2 Burrow's Rep. 701. 2 Vesey's Rep. 23. and 453. 7 Term Rep. 78. 9 Ves. 365. 2 Vernon's Rep. 705. 3 Brown's Rep. 164. 2 Vesey, jun. 18. 5 Vesey, 846. 3 East's Rep. 18. 8 East, 344.

‡ Turner's Rep. 134.

remains unaltered or unrepealed, no Judges ought to regard it with unbecoming jealousy, but to give it as liberal a construction as that which can be extended to any other remedial enactment. Corruption, in the comprehensive sense of that epithet, is the only ground on which the act gives courts of justice any authority to set awards aside, and when they assumed the power of rectifying obvious mistakes in calculation, it was as far if not farther than it was fit for them to go. Whether arbitrators are wise or foolish, they are the umpires to whom the parties have voluntarily submitted, and from their determination they ought not easily to be permitted to withdraw. It is a case to which the observation of Lord Keeper North on another subject most emphatically applies: "This court will not loose the fetters he hath put upon himself, but he must lie down under his own folly."*

The last statute to which attention shall here be drawn, is the 8th of Anne, c. 19. which may be termed the charter of Literary Property; and apprehensions may be justly entertained whether it has not been invaded by the judgments recently pronounced in courts of Equity with respect to *injunctions*. When the property in any literary work is infringed by piracy, experience has shewn it to be generally futile to bring an action at Common Law for damages. The only effectual remedy is to obtain an injunction against the al-

* Vernon's Rep. p. 101.

leged pirates in a court of Equity. Until of late, *injunctions* in cases of admitted piracy never were resisted. Within these few years, however, injunctions have been opposed upon this ground, that though a piracy was committed, the work pirated was of so libellous or immoral a nature that no property in it existed, and that the author or his assignee was not in that case entitled to the extraordinary remedy, which courts of Equity by means of injunctions have it in their power to grant. On these occasions Lord Eldon sitting in Equity has held, that he is bound to satisfy his own mind respecting the character of the work, either by himself reading the work or by hearing it read at the bar; and if in his judgment it be libellous or immoral, he refuses the injunction without at the same time thinking it necessary, as has been done in former times,* to desire any steps to be taken by the Attorney-General for the prosecution either of the publishers of the original work or of the piratical copy. Without entering into a protracted discussion respecting the soundness of the judgment which has been adopted, the subject is too interesting in itself as a legal question, and too important in its consequences to Society if the law has been correctly expounded, to allow it to be here altogether overlooked. The doctrine now maintained in Equity seems to rest upon the assumption of three distinct propositions: that an injunction is an

* Vesey's Reports, v. ii. p. 26.

extraordinary remedy: that every suitor who asks for an extraordinary remedy ought to come into court with clean hands: and that unless the judge believes the suitor's hands to be clean, he is not entitled to this extraordinary remedy unless his statutory right has been previously established by a Common Law action. None of these three propositions is unattended with difficulty. Whatever an injunction theoretically was, in practice it is, and in the present day ought to be, one of the most ordinary remedies which it is the duty of a court of Equity to dispense. How far a court of Equity should refuse to relieve a suitor, unless he comes into court with clean hands, it may neither be easy nor expedient to attempt to settle. Courts of Equity must wink hard indeed, not to see the uncleanness of the hands of almost all the parties in many of the questions which they determine. On this point it is not wise for courts of justice to be too fastidious. Causes are sometimes brought before the Common Law judges of so palpably ludicrous or immoral a nature, that they refuse to try them; and no doubt judges in Equity are entitled to exercise the same discretion, but it is the safest course for all of them to look as closely as possible at the merits of the matter in dispute, and as little at the antecedent merits of the parties. In this case, if the hands of the plaintiff are not clean, those of the defendant, by his own confession, are a great deal more polluted. By discouraging the defendant, therefore, an act of gross

dishonesty would be punished, the dissemination of unprincipled publications would be to a certain degree restrained, the plaintiff would remain exposed to the consequences of whatever turpitude he may have committed, and his conviction in a criminal court would almost infallibly be accelerated by the steps he had previously taken in a court of equity for his own protection. But is it certain, that when an injunction is prayed against an admitted piracy, the contamination of the pirated work ought to come at all into controversy? The moment the defendant has made an admission which puts himself out of court, according to the usual course he is permitted to proceed no further, though he might perhaps be able to state that which would put the plaintiff out of court also. The benefit of the act of Parliament claimed by the plaintiff, and the infringement of the act which is admitted by the defendant, seem to close the lips of the defendant as far as the injunction is concerned. The last of the three propositions, which supposes that a plaintiff is not entitled to the injunction unless the judge believes his hands to be clean, without having first established his statutory right at Common Law, assumes two points to be settled, upon the doubtfulness of which the whole difficulty of the case arises. In the first place, it is so far from being clear that the statute does not protect against piracy books of immoral tendency, that both the spirit and letter of the act afford strong colour to contend that

it was meant to extend to books of every kind and description. The contrary has never yet been regularly determined. There are indeed four *nisi prius* dicta to be found to that effect;* but nothing can be more dangerous than by a side wind to contract the operation of an important beneficial statute, without the point having ever been either regularly argued or determined. It is precisely this species of evasion which is here made the subject of complaint. But whether this statute should be found ultimately to protect libellous or immoral books against piracy or not, it is next to be considered whether every book ought not to be protected by injunction until it has been found libellous or immoral by the verdict of a jury. It would seem that this point must be governed by the provisions of the act of Parliament alone, and if that is adverted to, the case of literary property appears to bear no analogy to the case of patents, or any other to which it has been assimilated. In the instance of a patent, if an exclusive privilege does not belong to A, it must of necessity be open to B, together with all the rest of the world; whereas, in the piracy in question, it cannot by his own confession belong to the pirate by any possibility. It also appears with equal certainty from the act, that property in every literary work is vested in the author or his assignee, until it has been regu-

* Espinasse's *Nisi Prius* Cases, v. iv. p. 97.—Campbell's *Nisi Prius* Cases, p. 27 and 511.

larly divested; and neither the letter, spirit, nor purpose of the act, seem to give any power to an equity judge to effect that divestment, by refusing any of the equitable remedies which are necessary to make that statutory right effectual. Had the injunctions been granted which were in these cases required, the act of Parliament would have remained unimpaired, judges in Equity would have been relieved from a duty for which they are not qualified, and with which they ought not to be entrusted; property in literary works would have been confined as it ought to be to their authors and their assignees, and the public would have been saved from the effects of the contraband wholesale trade in indecency and immorality which has been now established. By the course now followed all this is completely reversed. The grossest dishonesty is encouraged: by determining the moral or immoral tendency of literary works, judges have assumed a jurisdiction which it is neither convenient nor constitutional for them to exercise: and has tended more than any other judicial act of the present century to force the circulation of mischievous publications into the lowest ranks of society, and the remotest corners of the kingdom.

The object of the whole of the remarks which have been hitherto made on the doctrines of Equity, has been to shew the inconvenience of deviating from the clear general rules which any state thinks proper to lay down for the administration of justice. It has been often said to be the hard case which makes bad law. It is the com-

passion which is excited against an innocent party; the prejudice which springs up in the mind against another who is perceived to be overreaching; together with an amiable desire to effectuate the dictates of natural equity to a greater degree than human tribunals ever will permit; and not a desire to exalt their own power or extend their own jurisdiction; which are the principal source of those mistakes into which courts of Equity have fallen. At first they flatter themselves they have attained the laudable objects which they had in view. As the suits to which their decisions give rise begin to multiply, their success becomes doubtful. In the end the accumulation of these cases becomes so great, and the shades of distinction between them so nice and perplexing, that at last it becomes irresistibly evident, the doctrines of courts of Equity would have been more clear and consistent, and the operation of the courts themselves more conducive to the common interest of the suitors, if the judges who preside in them had refrained from that controul over the Common and Statute Law of the land which they have unwarily been led to exercise.

CHAPTER II.

ON CERTAIN GENERAL REMEDIAL ACTS WHICH
MIGHT CONTRIBUTE TO THE IMPROVEMENT OF
COMMON LAW AND EQUITY.

IN the course of the preceding observations a variety of particulars have been mentioned in which the Common and Equitable Law of England appears to be defective or erroneous, and such suggestions have from time to time been offered as were thought likely to contribute to remove them. Some subjects however of a more general nature still remain, which could not be conveniently treated under any of the preceding heads, with respect to which the enactment of a body of statutory regulations appears to be urgently demanded. The only effectual method of accomplishing this would be by drawing up a succession of *remedial, consolidating, or declaratory acts*. Twenty or thirty of these, framed with comprehensiveness and accuracy, would tend more to facilitate the administration of justice, than all the labours of all the chancellors, chief justices, and judges, who ever sat in England. Though it may occasionally be doubtful where legislative *interpretation* should end, and legislative *enactment* begin, it is indisputable that in this country there has been a prodigious excess of the first, and an

equal deficiency of the latter. It could scarcely be credited by a stranger, that with our cart-loads of statutes, to which a quarto volume is every twelve months added of greater bulk than the whole of any other code in Christendom, not above a hundredth part of them consists of general and permanent laws, while the great mass of our jurisprudence rests upon no other foundation than the reasonings and opinions of those persons to whom the exposition of the law has been ministerially entrusted. Judges have wisely preferred the enjoyment of power to the display of its possession, and have as anxiously abjured the character of legislators as they have pertinaciously usurped their functions. It was said in the arguments for the antiquity and jurisdiction of the court of Chancery, "It cannot be denied
" but that the Chancery, as it judgeth in equity,
" is part of the law of the land, and of the
" ancient Common Law; and let it not be im-
" puted to the Chancery that the chancellor hath
" too great an arbitrary power in making his
" decrees; for if it be well observed, the judges
" use as great power in declaring what is law, as
" the chancellor in declaring what is equity; and
" if either be timorous, covetous, or malicious, as
" much hurt may be done us by the other;
" whereas, in truth, neither ought to proceed in
" doubtful cases without the judgment of Parlia-
" ment."* Lord Eldon has expressed an opinion

* Reports in Chancery, part 2. p. 62.

precisely similar. “The power of judges in this
“respect may be doubted. Upon that subject,
“as it applies to English law, I have formed an
“opinion which leads me to think that the judges
“of this day, in England, would not have been
“permitted to get rid of the statute of English
“entails, as judges of that age did soon after the
“passing of the statute *de donis*.”* This is true ;
yet the Common Law judges had just as good a
right to *restrict* entails *against* law on the one
hand, as Equity judges had in the course of the
last century to *extend* them *against* law on the
other. If the judges at Common Law destroyed
perpetual entails in *real property*, Equity judges
have created a modified entail in *personal property*,
of which last perhaps more than one half of the
whole wealth of the country at this time consists.
The commencement, progress, and completion of
that system of entails of *personal property*, which
has been established by Equity judges, can be
traced with the utmost distinctness, and is one of
the most glaring assumptions of legislative power
which courts of justice have ever exercised.† It
is unaccountable how a judge, possessed of so
enlightened and comprehensive a mind as Lord
Mansfield, should not have perceived the extreme
irregularity as well as inconvenience of that legis-
lative interpretation and administration of the law,

* Bligh's Rep. v. i. p. 435.

† Cases in Chancery, p. 129.—P. Williams's Rep. v. i. p. 1.—
Brown's Chancery Cases, v. i. p. 274.

which he carried to such an extent in his own practice. The end he had in view was admirable. The mistake he committed was in the means employed for its attainment. Except in the instances in which he attempted to break down the boundaries between Common Law and Equity, the alterations he wished to introduce would in general have improved the law and been beneficial to the suitors, but they ought to have been sanctioned by the authority of the legislature, and not established by the mere fiat of the court over which he presided. Such changes as he achieved, would not now be essayed in any department of our jurisprudence. Lord Stowell lately renounced, in express terms, all such authority on the part of the Ecclesiastical Court, over which he so long and so ably presided : “ There are certain learned
“ and ingenious persons,” he says, “ in that coun-
“ try who appear to think this rule too lax, and to
“ wish to bring it nearer to the rule which Eng-
“ land has adopted ; but on the best opinion
“ which I can form upon the subject, it is an at-
“ tempt against the general stream of the law,
“ which seems to run in a direction totally dif-
“ ferent, and is not to be diverted from its course
“ by efforts so applied. If it be fit that the law of
“ Scotland should receive an alteration, of which
“ that country itself is the best judge, it is fit that
“ it should receive it in a different mode than
“ that of mere interpretation.”* In the same de-

* Haggard's Reports, v. ii. p. 103.

gree that judges become sensible that they have for many years past done too much in the way of legislation, it is to be hoped the legislature itself will become sensible of having done too little. Their inactivity has almost amounted to a renunciation of their office. They have attended so little to the changes in the law which have gradually supervened, or those which the change of times and circumstances of society render necessary, that a great deal of legislation is now found to have become indispensibly requisite. On many subjects *remedial acts* are required. Upon other points the decisions of courts of law or enactments of the legislature are scattered through so many volumes, that the consolidation of them would be acknowledged as a public blessing. There are other matters on which *declaratory acts* would be equally beneficial. They would tend, more than any other measure that could be suggested, to disencumber the law of the useless and antiquated learning with which it is oppressed, and deliver it from the perpetual fluctuations to which it is exposed. Those who are practically acquainted with it, are well aware what an idle parade of knowledge is often made both at the bar and on the bench, by entering into unprofitable detail of the rise and progress of any particular doctrine, the circumstances of the cases which were first decided, the changes which the doctrines on the subject have undergone, and the state in which they are supposed to be at the conjuncture in which this didactic lecture is delivered. From

all this weary waste of words, a declaratory act would afford instant and complete relief. It would also put a stop to that vacillation which must unavoidably prevail as long as the decisions of the courts are the sole authority for the doctrines which they propagate. *Stare decisis* is one of the maxims which is never practised, though it is invariably recommended. If it had, those shifts of doctrine which pervade almost every department of legal investigation and adjudication never would have been perceptible. Nor can any contrivance be employed to prevent them. Few topics can be mentioned, in which judgments may not be found which are either directly opposed or not fairly reconcileable with each other, and at other times, though no direct discrepancy exists, the ground upon which some of them proceed is incompatible with principles of wider range and more universal application. Much of this uncertainty would be removed by declaratory acts of Parliament, and it never will without them. “ I want very much,” says Lord Ellenborough, “ to lay down a certain rule respecting the payment of interest. I recollect some extremely capricious determinations on this subject, and on all occasions as little as possible should be left in the discretion of a judge. My great object is to have a fixed rule, and to exclude discretion.” He then lays down his rule, and the reporter, after quoting a number of these capricious determinations, softens the disagreeableness of the fact which they disclose, by subjoining the following

consoling observation: "It would fortunately be
" a very difficult matter to fix upon another point
" of English law, where the authorities are so
" little in harmony with each other."* But who,
it may be asked, entitled Lord Ellenborough to
decide upon this occasion for all the future chief
justices and judges of England? Or what se-
curity is there, that some of his successors may
not reckon his decisions as capricious as he did
those of his predecessors? Whether future judges
adopt his judgments, or one of those which have
been superseded, they will still have a precedent
to quote in their favour, and perhaps will think
themselves guilty of no innovation should they
compound the two together. As long as men's
minds are variously constituted, so long the best
and ablest judges must be expected to differ, and
the only way to restrain that difference within
the narrowest bounds is to exclude it wherever
it becomes apparent by a succession of declara-
tory acts. This opinion has already been re-
corded by a Committee of one of the branches of
the legislature. "In addition to these measures
" of regulation," they say, "it has been suggested
" to the Committee, that there are some impor-
" tant points in the law of Scotland which have
" given rise to much litigation, and upon which
" *declaratory* acts might be passed with much
" benefit to that country; and that such legislative
" declaration, operating to remove doubts upon

* 1 Campbell's Nisi Prius Cases, p. 51.

“ these subjects, might reduce the number of ap-
 “ peals which have hitherto grown out of them:
 “ The Committee however have abstained from
 “ entering into any detailed consideration of such
 “ matters, deeming them more fit for the delibera-
 “ tive wisdom of the House.”* What is here re-
 commended for Scotland is not less necessary and
 would not be less beneficial for England. There
 is no branch of the law which they would not help
 to methodise and ameliorate, and it is difficult to
 fix the limits to which the extension of them might
 be carried. The adoption of them has already in
 some degree commenced,† and among those which
 it might be expedient to pass, a few instances shall
 in the first place be given of some which are *Con-*
solidating and *Declaratory*: secondly, of some which
 are *Remedial*: and lastly, of such as might be in-
 troduced *for the simplification of the law of Real*
property.

SECTION I.

Of Consolidating and Declaratory Acts.

1. ONE of the classes of consolidating and declaratory acts which it might be desirable to pass, relates to the rights and duties of those

* Report of the Lords Com. on the Appellate Jurisdiction, 1823, p. 7.

† 1 & 2 Geo. 4. c. 78. and 1 & 2 Geo. 4. c. 114.

persons whose interests most frequently form the subject of discussion in courts of justice. Among these are parents and children, husbands and wives, landlords and tenants, masters and servants, debtors and creditors, tenants for life and tenants in tail, partners, heirs, trustees, and executors. It might be too arduous to endeavour to condense the whole of the law on any of such subjects into one act, but the most distant approach to it would confer an obligation upon the community of which those who are conversant with courts of justice would most highly estimate the value. Few of the persons who stand in these relative situations have any distinct or general knowledge of their powers and liabilities, and an act of parliament which should point out the most important of them plainly and succinctly, would add materially to the satisfaction of their minds and exact fulfilment of their duties. In the various offices which a man is called upon to discharge, he is obliged to trust as much to his lawyer as a Roman Catholic is to his priest; though it seems reasonable that the rules of his civil as well as religious conduct, instead of being wrapped up in scattered and inaccessible treatises and reports, or collected as they are now beginning to be by the industry of individuals,* should be pre-

* See the treatise published in 1825, by Sir G. F. Hampson, on "the Means by which those who accept the Situation of "Trustees may perform their Duties without incurring Responsibility."

sented to him in a condensed and intelligible form, under the authority of the legislature. Some of the privileges belonging to the characters which have been enumerated, are unreasonable in themselves, injurious to third parties, and sometimes even to those for whose protection they were originally given. These would be corrected. Some of the liabilities are also too severe, and others not severe enough. These would be alleviated or increased; and thus the law would become not only more accessible to those who are most interested in its provisions, but the discussions which this process would occasion or hints it would suggest, could not fail to make it at the same time more equitable and consistent.

2. Another of these consolidating and declaratory laws which seems to be wanted is, a law declaring the qualities and attributes of different species of Property. The great preference which was formerly given to *real* property in England, the small amount of that which was *personal*, and low estimation in which it was held when the law assumed its present form and consistence, has since proved the occasion of grievous inconvenience and injustice. Blackstone observes with respect to those species of property to which the appellation of *real* is still attached, that “these
“being constantly within the reach, and under
“the protection of the law, were the principal
“favourites of our first legislators: who took all
“imaginable care in ascertaining the rights, and

“ directing the disposition of such property as
“ they imagined to be lasting, and which would
“ answer to posterity the trouble and pains that
“ their ancestors employed about them; but at
“ the same time entertained a very low and con-
“ temptuous opinion of all personal estate, which
“ they regarded as only a transient commodity.
“ The amount of it indeed was comparatively
“ very trifling during the scarcity of money, and
“ the ignorance of luxurious refinements, which
“ prevailed in the feudal ages. But of later years,
“ since the introduction and extension of trade
“ and commerce, which are entirely occupied in
“ this species of property, and have greatly aug-
“ mented its quantity and of course its value, we
“ have learned to conceive different ideas of it.
“ Our courts now regard a man’s personalty in a
“ light, nearly, if not quite equal, to his realty;
“ and have adopted a more enlarged and less
“ technical mode of considering the one than the
“ other, frequently drawn from the rules which
“ they found already established by the Roman
“ law, whenever those rules appeared to be well
“ founded and apposite to the case in question,
“ but principally from reason and convenience,
“ adapted to the circumstances of the times; pre-
“ serving withal a due regard to antient usages,
“ and a certain feudal tincture, which is still to
“ be found in some branches of personal proper-
“ ty.”* This is certainly true, but a vast deal

* Blackstone’s Commentaries, v. ii. p. 384.

more remains to this hour to be done. Even the names which have been given to various species of property are awkward; the distinctions which have sprung from these names are troublesome, especially if property is reckoned *personal* in one part of the empire and *real* in another, as is the case with *heritable bonds* in Scotland;* and the consequences are strange and unreasonable. A legacy may be found to be vested or not, just as the property of which it consists is of a *real* or *personal* nature.† A condition imposed upon a legatee respecting marriage, is effectual or nugatory precisely as it is charged upon *real* or *personal assets*.‡ If a charge is made on land, whether that charge is created by deed or will, and whether it is provided by way of portion for a child, or given merely as a legacy by collateral relations, if it is payable at a future day, it cannot be raised if the party dies before the day of payment. If the same charge is made upon *personal* estate, it survives to the representatives of the legatee.§ At Common Law *choses in action* cannot be assigned, and an action brought on them must be raised in the name of the original holder; nor do they constitute a sufficient debt to enable a creditor to petition for a commission of bankruptcy. Promissory notes given for money won at play are

* Maddock's Rep. vol. iv. p. 477.—6 Brown's Parl. Cases, p. 601.

† Brown's Ch. Cases, vol. ii. p. 77.

‡ See Cases in Maddock's Eq. vol. ii. p. 29.

§ Atkyns's Rep. vol. i. p. 485.

also by the statutes that have passed rendered bad in the hands of the most remote innocent holder to whom they may in the course of trade have travelled.* Some very capricious distinctions also exist between *real assets* and *personal assets*. A lease *for any number of years* is *personal assets*; but an estate *to the heir for life as special occupant* is *real assets*. A lease for life to a man confers a freehold, whilst a lease for 999 years amounts to no more than a *chattel interest*. As the last, and in its consequences by far the most important instance of the effect of a name, *stock* in the public funds is not liable to an execution for debt,† and considering its vast amount, this exemption and the rules of the King's Bench prison, constitute two privileges of which debtors ought long ago to have been dispossessed, either by the vigour of courts of law or the wisdom of the legislature. Whether it would be advisable to make one or more separate enactments respecting different sorts of property or not, some endeavour ought to be made to define their several natures and qualities, and to abolish many of the artificial and useless distinctions which prevail among them.

3. A consolidation of the Poor Laws seems also to be a desideratum. All attempts to rec-

* Fonblanque's Equity, vol. i. p. 255.

† 1 Vesey, Jun. p. 198.—9 Vesey, 189.—1 Ball and Beatty's Rep. p. 390.

tify the poor laws have so invariably ended in disappointment, that they may almost be regarded as hopeless. If the principle of these laws can neither be superseded nor improved, it would still be a kind of *tabula in naufragio*, if their provisions could be framed with such skill and expressed with such perspicuity as to lessen the litigation they occasion. It is painful to see so much of the time of the highest Common Law court in the kingdom, and so large a space in the records of its proceedings, occupied in settling petty disputes about paupers, overseers of the poor, and churchwardens. A careful consolidation of the enactments which are now in existence, could hardly fail to contribute towards this effect.

4. Another subject on which it is still more desirable that a consolidating and declaratory law should be passed, is that of Marriage. In a subject of such moment to society at large as well as to those who stand in the relation either of parents or children, it seems highly expedient that the law which regulates its *contraction* and *dissolution* should be the same in every part of the united empire. With respect to the *contraction* of marriage, it is the settled law of England, that every marriage is valid there which is valid by the law of the country where it was contracted. This doctrine has been long received, and the reasons of it are so ably expounded in the following judgment of Sir Edward Simpson, in 1752, that it well deserves quotation. "All na-

“ tions allow marriage-contracts; they are *juris*
“ *gentium*, and the subjects of all nations are
“ equally concerned in them; and from the infi-
“ nite mischief and confusion that must neces-
“ sarily arise to the subjects of all nations with
“ respect to legitimacy, successions, and other
“ rights, if the respective laws of different were
“ only to be observed as to marriages contracted
“ by the subjects of those countries abroad, all
“ nations have consented, or must be presumed
“ to consent, for the common benefit and advan-
“ tage, that such marriages should be good or
“ not, according to the laws of the country where
“ they are made. It is of consequence to all;
“ that one rule in these cases should be observed
“ by all countries,—that is, the law of the country
“ where they are made. By observing this law
“ no inconvenience can arise, but infinite mischief
“ will arise if it is not. For instance,—supposing
“ this marriage should be declared good, might
“ not Mr. Scrimshire nevertheless go into *France*,
“ and marry another woman there, the first mar-
“ riage being null there? He might come into
“ *England* after his marriage in *France*, and live
“ here, and could not be prosecuted for bigamy,
“ according to *Kelyng*; for the felony being done
“ abroad, could not be tried here. The conse-
“ quence would be that he might have two wives,
“ and might have lawful issue by both in different
“ places. His children in *France* would be bas-
“ tards in *England*, but would be legitimate in

“ *France*, and might inherit there; and the children by *Jones* would be legitimate in *England*, but bastards in *France*, and would not inherit there. The *French* woman that he married in *France* would have no right to *English* effects, for *Jones* is the lawful wife here. *Jones* would have no right to *French* effects, for she is not the lawful wife in *France*. And if, as it may happen, after they have had children, both should go to *France*, and should marry again, and have children in *France*,—what infinite confusion would attend all these consequences of such a principle, to the great detriment and inconvenience of themselves and their issue, and the subjects of both countries! Again, if countries do not take notice of the laws of each other with respect to marriages, what would be the consequence if two *English* persons should marry clandestinely in *England*, and that should not be deemed a marriage in *France*? Might not either of them or both go into *France* and marry again, because by the *French* law such a marriage is not good? And what would be the confusion in such a case? Or again—Suppose two *French* subjects not domiciled here, should clandestinely marry, and there should be a sentence for the marriage. Undoubtedly the wife, though *French*, would be entitled to all the rights of a wife by our law. But if no faith should be given to that sentence in *France*, and the marriage should be declared

“ null, because the man was not domiciled; he
“ might take a second wife in *France*, and that
“ wife would be entitled to legal rights there,
“ and the children would be bastards in the one
“ country and legitimate in the other. So that
“ in cases of this kind, the matter of domicile makes
“ no sort of difference in determining them; be-
“ cause the inconvenience to society and the pub-
“ lic in general is the same, whether the parties
“ contracting are domiciled or not. Neither
“ does it make any difference, whether the cause
“ be that of contract or marriage; for if both
“ countries do not observe the same law, the in-
“ convenience to society must be the same in
“ both cases. And as it is of consequence to the
“ subjects of both countries, and to all nations,
“ that there should be one rule of determining in
“ all nations on contracts of this kind, it is to be
“ presumed, that all nations do consent to deter-
“ mine on these contracts, by the laws of the
“ country where they are made; as such a rule
“ would prevent all the inconveniences that must
“ necessarily arise from judging by different laws,
“ and is attended by no manner of inconvenience,
“ but is for the advantage of the subjects of all
“ nations.” He afterwards subjoins, “ In com-
“ mercial affairs under the law-merchant, which
“ is the law of nations, there are instances where
“ sentences for or against contracts abroad have
“ been given and received here on trials as evi-
“ dence, and have had their weight. And this

“ has been allowed on a principle of the law of
“ nations, which all countries by consent agree to
“ for the sake of carrying on commerce, which
“ answers the public in general. There are in-
“ stances of the same kind in the court of Admi-
“ ralty. The sentences of all courts of Admiralty
“ are taken notice of by one another. They are
“ obligatory by the law of nations. By the mu-
“ tual consent of all nations, they take notice of
“ one another’s sentences, and give mutual faith
“ to their proceedings. All courts of Admiralty
“ in Europe are governed by the same law,—the
“ law of nations. And it is just by the law of na-
“ tions for nations to be aiding and assisting to
“ each other. And therefore the law of England
“ takes notice of the law of nations in commercial
“ and maritime affairs, because all nations are in-
“ terested in these questions; and as all countries
“ are equally interested to have matrimonial ques-
“ tions determined by the laws of the country
“ where they are had, and the mischief would be
“ infinite to the subjects of all countries if it was
“ not so, I am of opinion that this is the *juris*
“ *gentium* of which this and all courts are to take
“ notice.”* This judgment deserves the more at-
tention from having been pronounced after a pre-
vious consultation with Lord Hardwicke;† and it

* 2 Haggard’s Rep. in the Consistory Court of London, p. 417 and 420.

† Id. p. 446.

has since received the full concurrence of Lord Stowell, whose enlightened and comprehensive elucidation of this part of the law, in determining a case which came before him in 1811,* will always hold a conspicuous place among those leading determinations upon great questions of international law with which that accomplished judge has enriched the jurisprudence of his country.

As it is the law of Europe that a marriage which is valid in the state where it is contracted is valid every where else, it seems fit that the ceremonies which any state prescribes for the celebration of marriage should, as far as possible, be the same for all classes of persons and on all occasions. On this ground it is somewhat difficult to account for the encouragement of the celebration of marriage in England by licence instead of the method regularly prescribed by publication of banns. "When "I consider the Rubric," says Lord Hardwicke, "and the act of uniformity which takes in the "very text of the Rubric, I am astonished how "licences ever got footing in this kingdom; and, "for my own part, I could wish that all marriages "were by publication of banns only."† It is equally desirable that marriage should be constituted in every part of the same state in the same manner. This would require a change to be made either in the law of England or in the law of Scotland, or perhaps of both; but whatever alteration

* 2 Haggard's Cases, p. 58.

† 3 Atkyns's Rep. p. 812.

it might be most advisable to adopt, the present state of society strongly demands that some uniform rule should be adopted. While there should be only one method for the celebration of marriage within the territories of the same state, it is no less necessary that it should be declared by legislative authority what requisites are necessary to constitute a marriage between parties, one or both of whom are English;—in those colonies of our own where no positive rules have yet been laid down, or from particular circumstances cannot be followed;—where such marriages have been celebrated in the chapel or house of an English ambassador by his chaplain or some other clergyman, or by the ambassador himself;—with an English army in an enemy's country;—or in a foreign country, where, from the situation of the place or the parties, the ceremonies for the contraction of marriage required by law could only be in part or not at all complied with. In case of any consolidation of the laws of marriage, distinct provisions, specifying what is necessary to the contraction of marriage in all these cases, would be an improvement of the law, and set at rest the minds of many of the parties interested, who have been seriously distressed by the surmises which the present state of ambiguity has occasioned.*

The *dissolution* of marriage however is of no less moment than its *contraction*; and until the inter-

* 2 Haggard's Rep. p. 371.

national law of Europe shall become as uniform with respect to the latter as it already is with respect to the former, every one of the painful consequences, enumerated by Sir Edward Simpson, does and must necessarily continue. In some states divorce is not permitted at all; in others, it can only be granted by the legislature, or supreme ecclesiastical authority; and in many it may be decreed by the sentence of the court to which the jurisdiction of such matters properly belongs. Under these circumstances, each state judges of the dissolution or subsistence of a prior marriage, and of the validity or invalidity of a subsequent one, according to its own municipal law, and by that law the status of the parties is regulated as long as they remain domiciled within its jurisdiction. The consequences of this *conflictus legum* are lamentable; and the wandering disposition which accumulation of wealth and facility of communication produce have highly aggravated the evil. There are many couples now scattered over Europe, and among them a considerable number of English persons of rank and fortune, whose change of domicil transforms and re-transforms their children within a few years from legitimate to illegitimate, and from illegitimate to legitimate again, and renders their own union alternately innocent, adulterous, or incestuous. There seems no possibility of putting an end to this deplorable confusion but by a general agreement among the states of Europe respecting the degrees of consanguinity or affinity within which marriage shall be contracted;

by allowing it to be dissolved for adultery, where there is no collusion, but for no other cause; and by permitting all countries under these restrictions to sanction its dissolution as well as its contraction. If the whole of Europe cannot for its common benefit be brought to consent to a uniformity of law, at least uniformity ought to prevail over the whole dominions of the same sovereign, which at present it is well known not to do. The law of Scotland permits the dissolution of marriage to all its inhabitants, and as has been thought with too much facility. The law of England forbids it to all, but the legislature permits it to as many as are rich enough to pay for the indulgence. Every one of these topics requires discussion; and the law of marriage will never be placed upon a proper footing, until it has received a closer and more comprehensive consideration than has ever yet been bestowed upon it.

5. To the consolidating and declaratory acts which are needed, a general statute of *Limitations* may be added. A complete and judicious statute of limitations by sweeping away the endless and often unfounded distinctions and analogies which now perplex the law of England, and by introducing a few plain and comprehensive precepts for the information and security of the king's subjects, would perhaps put an end to more uncertainty and litigation than any one single law which could be mentioned. *Expedit reipublicæ ut finis sit litium*, is an admirable maxim; and its object could not be more effectually for-

warded than by declaring that no effect should be given to suits or rights unless they were claimed or prosecuted within a reasonable period. The utility of some principle of limitation has been recognized in every country where a regular system of jurisprudence has been established. In no code was its value more clearly perceived or distinctly announced than in that of Rome; and the law which establishes the forty years' general prescription for actions, is concluded in the following words: "*Quicquid autem præteritarum præscriptionum, vel verbis vel sensibus minus continetur, implentes per hanc in perpetuum valituram legem sancimus: Ut si quis contractus, si qua sit actio, quæ cum non esset expressim prædictis temporalibus præscriptionibus concepta, quorundam tamen vel fortuna, vel excogitata interpretatione sæpe dictarum exceptionum laqueos evadere posse videntur, huic saluberrimæ nostræ sanctioni succumbat, et quadraginta annorum curriculis proculdubio sopiatur: nullumque jus privatum vel publicum in quacunque causa vel quacunque persona, quod prædictorum quadraginta annorum extinctum est jugi silentio, moveatur: sed quicumque super quolibet jure quod per memoratum tempus, inconcussum et sine ulla re ipsa illata judiciaria contentione possedit, superque sua conditione, qua per idem tempus absque ulla judiciali sententia similimunitione petitus est, sit liber, et præsentis saluberrimæ legis plenissima munitione securus.*" A subsequent section, after explaining

that the *actio hypothecaria* brought no relief to debtors, though it did to other persons, very wisely extends the benefit of it to them also for this very substantial reason, “ne possessores ejusmodi prope immortali terrore teneantur.”* Almost every one of our own judges have concurred in these opinions, and among others Lord Coke, Lord King, Lord Alvanley, Lord Manners, and Sir T. Plumer,† have distinctly expressed their acquiescence in their wisdom.

Though the public is disposed to do justice to the utility of the law of prescription when generally viewed, they are seldom favourable to its operation in particular instances. When they are told of a palpable and grievous injury that has been sustained through ignorance, confidence, or want of protection, and hear that mere lapse of time cuts off the injured party from all remedy, their reason is so subjugated by their feelings, that they almost invariably pronounce it a disgrace to law and equity that this should ever happen. But it would be one of the most chimerical of all benevolent projects to attempt to do complete justice at a distant interval from the date of the acts complained of. If the parties were sure to continue in life and their circumstances to remain unaltered, there is no reason why inquiry should not be carried back to an unlimited period.

* Cod. Lib. 7. tit. 39. § 4 and 7.

† Coke's 2d Inst. p. 95.—Cases temp. King, p. 156.—Brown's Ch. Cases, v. 4. p. 269.—Ball and Beatty's Rep. v. i. p. 156.—Jacob and Walker's Rep. v. ii. p. 140.

But this supposition is incompatible with the lot of humanity. The state of those who have done or received an injury soon changes, and innocent parties intervene. Marriages are contracted, children are born, and sales, purchases, and exchanges, are negotiated with strangers; all of whom would be exposed to the greatest risk and uncertainty, unless certain land-marks were set up, either by acts of the legislature or the practice of courts of justice, beyond which no investigation should be permitted. If it were, it would do little good and produce incalculable mischief. If an estate is taken from one family which acquired it unjustly, and given to another possessing a stronger natural title, the public generally expresses satisfaction at such an occurrence, though it rarely proves a blessing to the gaining party. Sudden and unexpected changes are seldom propitious either to those who have been elevated or depressed. The accession of rank or fortune affords little real pleasure to those who did not expect and may not be qualified to enjoy it, while the loss of them causes the most sensible pain to those who have been accustomed to their possession. The very constitution of man therefore obviously requires, that mere length of possession should be one of the chief circumstances by which the right to property, privileges, or immunities, is determined.

In England the old law was, that the possession of property alone created a right to it, but, says Bracton, "*quam longa esse debeat, non definitum*

“ a jure sed ex justitiariorum discretione.*” There have since been a considerable number of statutes of limitation introduced for particular purposes,† but even at the present day, if no other time is specially mentioned, what is called *the time of legal memory* must begin from the reign of Richard I. in the year 1190, and a possession of 635 years is now required to create a title by prescription. Were it really necessary in all but excepted cases, to trace controverted titles up to this distant period, it would introduce a scene of uncertainty and confusion which would be absolutely insupportable. Of this the Common Law Judges have been so sensible, that they have been necessitated to establish a body of presumptions which have no other foundation than their own will and pleasure. They have presumed a person to be dead who has not been heard of for 7 years; the grant of *ways, window lights, easements, markets, offices*, and even of *letters patent* and *acts of parliament* from a possession of 20 years; the satisfaction of *bonds* and *judgments* by non-payment for the same period;‡ and the *surrender of an outstanding term* after a

* Bracton de Leg. lib. ii. cap. 22. p. 51.

† Among these may be mentioned, Westminster 1st. or 3 Ed. 1. c. 38. Westminster 2d. or 13 Ed. 1. c. 2. et seq. 20 Hen. 3. c. 8. 4 and 5 Hen. 7. c. 24. 32 Hen. 8. c. 2. 31 Eliz. c. 5. 20 James 1. c. 4. and 16. 10 and 11 W. 3. c. 14. and 31. 4 and 5 Anne, c. 16. 9 Geo. 3. c. 16.

‡ See some of the cases on these subjects collected in Term Reports, v. 3. p. 151. Saunders' Rep. v. 2. p. 175. Phillips on Evidence, ch. 7. sect. 2.

lapse of 40. They soon afterwards refused to presume *the existence of a conveyance*, after a possession of considerably longer duration;* and have never, even after centuries of possession, attempted to presume a composition for tithes, the commencement of which composition, the jurisprudence of this country, says Lord Hardwicke, “ by a pretty extraordinary law, and “ which I believe no other country does, makes “ from the transportation of Richard I. to the “ Holy Land.”† Those who now preside in courts of Common Law are rather inclined to restrict than extend this branch of their jurisdiction; but the length of time during which it has been exercised, will neither allow them to advance nor retreat without inconsistency. Courts of Equity have raised the same *presumptions* in matters which are of an equitable nature. This is particularly observable with respect to trust estates, with which courts of Equity are so much conversant. In order to make the *equitable* qualities of real property in all respects commensurate with those which are *legal*, courts of Equity have invented the phrases, *equitable disseisin*, *equitable recovery*, *adverse possession of equitable estates*, and some others, without being able to give any distinct explanation of their meaning, and have endeavoured to apply the doctrine of *presumptions* to *equitable* estates, in all cases in which it is appli-

* Barnewall and Alderson's Reports, v. ii. p. 782. vol. v. p. 232.

† Vesey's Rep. v. ii. p. 511.

cable to *legal* estates at Common Law. Still they have advanced with much slowness and circumspection, and the elaborate discussions and judgments in the important case of Cholmondeley and Clinton, and ultimate decree pronounced upon it in the House of Lords, can scarcely be regarded in any other light than as a legislative enactment settling the period of limitation in equitable rights to real property. The period which courts of Common Law and Equity appear to have pitched upon by common consent in such cases, is that of 20 years, which may generally be regarded as a sufficient length of time either to estop a real right or bar a penal action. At the same time this is not universal, and under the present practice of courts of Equity, cases of extreme hardship sometimes occur. Twenty years does not bar a bill,* and no length of time bars an account between merchants, or a trust account. In a case which came before Lord Alvanley, he said, “If this had been land, and a fine had been levied, it would have barred all the world, but being unequitable interest, it is contended that it is open for ever.”†

Respecting the whole of these doctrines of presumption and limitation, which are gradually accumulating, though they are in general reasonable in themselves, and laudable in their object, they constitute a very inadequate and unsatisfactory method of settling the law on one of the most im-

* Vesey, jun. 283.

† 4 Brown's Ch. Ca. 214.

portant subjects of municipal policy. The practice of judges is in direct contradiction with their declarations. "Limitation of suits," says Lord Rosslyn, "is not a judicial power, but a legislative one. The rules of limitation are not matter of policy, but positive law. *Expedit reipublicæ ut finis sit litium*, but this is not the business of the Judge, for that would be *jus dare* not *jus dicere*."* Yet in diametrical opposition to this very principle, the law has been *made* and not *declared* in every one of the cases which have now been mentioned. A great deal too much of the the law of England rests upon analogy, fiction, and presumption. The law of limitations can scarcely be said to rest upon any other, and its defectiveness and incoherence must in a great measure be ascribed to the want of a better foundation. It is not easy to account for the supineness which the legislature has shewn on this subject. Except in an unsuccessful attempt to introduce a restricted statute of limitation in 1728,† it scarcely appears ever to have attracted attention during the whole of the last century. It is to be hoped this neglect will not continue much longer. What the particular period of limitation ought to be, must vary with the rights and interests to which it extends. The precise period of limitation pitched upon is not of so great moment. A few years less or more in many instances could

* 4 Brown's Ch. Ca. 458.

† Chandler's Parliamentary Debates, v. iv. p. 7.

make no great difference. Only let a general and comprehensive enactment be promulgated for the direction both of judges and suitors, and it will settle a greater number of rights, and quiet the minds of a greater number of persons, than any one act which can be pointed out among our public statutes.

6. The last class of consolidating acts which shall be specified, is an act for the consolidation of the law of evidence.—The cardinal rules of evidence established in the law of England are—that the best evidence should be produced which the nature of the case admits—that the evidence which plaintiffs and defendants adduce should be confined to the points at issue—and that the substance of the issue only need be established at the trial. These general principles are admirable, and the success with which they are made to exclude all evidence which is extraneous, and elicit that which is relevant, shows the skilfulness of their general application. There is perhaps no country in Europe in which the law of evidence is, upon the whole placed upon a better footing than in England, and there certainly is none in which *viva voce* examinations are conducted with so much ability. At the same time it seems neither to betray inconsistency nor want of candour to maintain, that there are a number of points relating both to *documentary* and *oral* evidence in the law of England, some of which require to be consolidated and others reconsidered. Some of its rules, which would be excellent if confined

within moderate limits, are pushed to such an extreme of strictness and refinement as to become vexatious;* and others, though they cannot be denied to do good, at the same time do so much harm, that they are not worth preserving.

Most of the doctrines relating to *documentary evidence*, flow from two main principles, neither of which seems to rest upon any intelligible foundation. The first is, that some courts are *Courts of Record*, and others are *not Courts of Record*; and the second, that *deeds which are thirty years old prove themselves, while those which are not thirty years old must be proved*. With respect to *Courts of Record*, and *Courts not of Record*, the distinction arose in comparatively barbarous times, and is neither serviceable nor scientific. It seems strange that a court of *pie-poudre*, which is incident to every fair and market, and of which the steward of him who has the toll of the market is the judge, being the lowest and least known in practice of all the courts in England, should be a Court of Record, while the court of Chancery, which is the highest court in the country, should not be possessed of that privilege. The same anomaly prevails in many other instances, and the whole distinctions between Courts of Record and not of Record might safely be exploded. Certain general rules might then be laid down, applicable to all courts whatsoever, specifying the manner in which judgments or proceedings which have taken place,

* See Phillips, p. 214—232. Variance too much guarded against.

either those which are foreign or domestic, should be proved, and the faith which should be given to them when their authenticity has been admitted. A regulation of the same sort might be made relative to *deeds*. Why should a deed of thirty years old prove itself, more than one of thirty hours ?* The reason appears to be all the other way. If forgery is likely to be committed, it is more likely to be of an old deed than of a new one, some of the witnesses to which are probably still alive, and could be produced, were their presence necessary. If all deeds which are *ex facie* regular were presumed to be valid, they might be produced a reasonable time before the hearing of the cause for the other party to examine, and if still disputed, the burden of falsifying them might then lie upon the parties by whom they were challenged. This arrangement would give no encouragement to forgery ; and it would save those who are now obliged to prove deeds a degree of trouble, delay, and expense, which is at present made the means of most severe oppression.

There are also several matters relating to *oral evidence*, which require consolidation and amendment. At Common Law and in Equity, one witness is sufficient to prove a fact. By the Ecclesiastical Law, which is in most instances similar to the Roman, it requires two. It seems strange that there should be such a striking discrepancy between two laws co-existent in the same coun-

* Phillips on Evidence, p. 489, et seq.

try, and that too in a principle in such constant and extensive operation. Next to the number of witnesses who are thought necessary to establish a fact, may be mentioned the rules which are now in force with respect to their admissibility. A witness may be disabled from giving his testimony from loss of character, interest, or relationship. No person who stands in the situation of a convicted felon, or who has been convicted of a *præmunire*, of barratry, a conspiracy to accuse another of a capital offence, or who has in certain cases been convicted of being a fraudulent gamester, is a competent witness.* If it is thought proper to visit the loss of a good name so severely, the principle ought to be carried throughout. So far is this from being the case however, that a person convicted of perjury may file a bill for discovery in Equity, and his own affidavit is sufficient to support it;† and a person who stands in the situation of an outlaw is singularly enough permitted to be an executor or administrator.‡ A person is also precluded by Common Law from giving evidence as a witness, if he has any decided interest in the suit. While this remains to the present day a fundamental maxim of the Common Law, the very first step which is taken in Equity is to examine the defendant himself upon oath, though he has usually more interest in the suit than any other person. Indeed the rules which

* Phillips on Evidence, p. 29, et seq.

† Ball and Beatty's Rep. v. i. p. 565.

‡ Vernon's Rep. v. i. p. 184.

are laid down with respect to interest are in many instances so questionable, and in all so numerous and refined,* that one cannot help thinking they might be replaced by others more plain and efficacious. It is another rule of law, that husband and wife can neither be examined for or against each other. In criminal cases this seems to be extremely just: in civil matters its necessity may be doubted at Common Law, and still more in Equity; for the want of the evidence of the wife, often prevents that disclosure of the truth which the purposes of justice urgently demand. Supposing a witness to be neither disqualified by character or relationship, the last point which behoves to be considered is the manner in which the examination of a witness is conducted, and the questions which he is either permitted or compelled to answer. Expressing all due admiration of the ability with which the oral examination of witnesses is managed in England; one cannot help wishing that it were conducted generally with greater gentleness and temper. An insulting or overbearing tone and manner frequently confuses an upright witness, but seldom extracts the truth from one who is unconscientious. In one material point the mode of examination now in use seems defective. As a witness is justly presumed to be rather favourable to the party for whom he is called, the counsel who cross-examines him is permitted to throw his

* Phillips on Evidence, p. 43—71.

questions into a different shape from that which the counsel who called the witness is allowed to do. This is generally found conducive to the discovery of truth. But it not unfrequently happens that a witness, instead of entertaining any partiality for that side for which he is called, is in reality favourable to the other party.* The purposes of justice, therefore, seem to require that where such a bias distinctly manifests itself, the witness should either be cross-examined by the judge himself, or the privilege of cross-examination given to the party by whom he was originally brought forward. To some questions the witness may decline, and to others he is not allowed to answer. The witness may, if he thinks proper, refuse to answer any question which tends to criminate himself; and he is only allowed to give evidence of what he has himself heard or seen of the things in question, and, except in a few instances, is not allowed to report the *hearsay* uttered by a third person. The first of these rules seems unexceptionable: the expediency of the second has given rise to greater difference of opinion than any other matter connected with the law of evidence. The chief reason for the exclusion of *hearsay* is, that the person from which the facts have proceeded should himself be examined if living, and, if dead, the report of them should not be received at second hand, because the reporter cannot then be cross-examined. The chief reason for its introduction is, that *hearsay* is itself

* Phillips on Evidence, p. 284.

a fact, which like all other facts adduced in evidence, ought to be laid before the judge or jury, and allowed to create that effect which the character of the witness who repeats the hearsay, the circumstances under which it came to his knowledge, and its intrinsic credibility, is calculated to produce upon them.

Upon all topics connected with the law of evidence, it is the object of the preceding observations rather to promote inquiry than to support any pre-adopted theory. There are few subjects where a union of theory and practice is more indispensably requisite in order to reason comprehensively and correctly. The course of examination which took place on the trial of Fualdes, which took place in France some years ago, conclusively proves the necessity of laying down rules of some sort or other for circumscribing the evidence which it is practicable to offer; and also shews that, however great the benefits may be which the new code has conferred upon the law of France, there are many points on which their practice must of necessity be much too easy as well as unsettled. While an increase of strictness would improve the law of France, it may be doubtful whether a relaxation of it would not be equally advantageous to the law of England. It is generally admitted that Lord Mansfield rendered a service to the law by confining objections rather to the credibility of witnesses than their admissibility;* and there are few persons capable

* Phillips on Evidence, p. 44.

of general reasoning who have turned their attention to the subject, without becoming persuaded that the rules which incapacitate a person from appearing as a witness on account of character, interest, or affinity, might advantageously sustain still further mitigation. Perhaps the law of evidence is altogether somewhat too artificial. It not only prescribes one particular method of obtaining it as the most commodious, but if it is presented in any other manner, it is rigorously rejected. Unnecessary fastidiousness ought carefully to be avoided; and rules of evidence, which are of no use except in as far as they are subservient to the methodical and effectual discovery of the truth, ought never to be made the means of its concealment. Neither ought the law of evidence, especially in criminal cases, where a crime has been substantially proved, to allow the criminal on mere point of form, to escape from the punishment which regularly ought to follow. The business of human life, or even of courts of justice, could not go on if the proof were to be conducted, or every point were to be proved, with mathematical precision, and all attempts to approach it, directly and powerfully frustrate the ends of justice which they were intended to promote. That some defects of this sort cleave at present to the law of England there is too much reason to suspect, and the correction of them would be one of the advantages with which a revision of the law of evidence could not fail to be accompanied.

SECTION II.

Of Remedial Acts.

No consolidation of laws can take place without being at the same time in some degree *remedial*; and few remedial acts can be devised, which are not strictly speaking a consolidation of old laws, rather than the introduction of those which are entirely novel. The only reason for making any distinction between those enactments which have been treated of in the preceding section and those which form the subject of the present is this, that in the one case the consolidation of the law is the main object, and the remedial alterations which ensue are only collateral, while in the other the proposal of a new or at least more effectual remedy for an acknowledged imperfection is the primary object of the proposed enactments.

1. The first of the remedial acts which may be suggested, is to oblige the plaintiff, at Common Law and in Equity, to give security for the costs in which he may be found liable to the defendant. While legal process ought to be so framed as to make the law as accessible as possible to every individual, he should never have it in his power to convert it into an engine of injury or oppression. In antient times, both in actions at law and suits in Equity, the plaintiff gave efficient pledges to

the defendant that he would prosecute his claim, and if he failed, he and his pledges were answerable to the defendant for the damages sustained. In Equity this course is specifically pointed out by 15 Henry 6. c. 4. which runs in the following terms:—"Also for that divers persons have before
" this time been greatly vexed and grieved by
" writs of *Subpœna*, purchased for matters deter-
" minable by the Common Law of this land, to
" the great damage of persons so vexed, in sub-
" version and impediment of the Common Law
" aforesaid; our Lord the King willeth that the
" statutes thereof made be duly observed ac-
" cording to the form and effect of the same, and
" that no writ of *Subpœna* be granted from hence-
" forth until surety be found to satisfy the party
" so grieved and vexed for his damages and ex-
" pences, if so be that the matter cannot be made
" good which is contained in the bill." Though some doubt has been cast upon the authenticity of this statute, because it is not to be found on the parliamentary rolls, the weight of authority has always been conceived to be in its favour, and the allusions which are made to it in the bills in Equity, which were filed soon after its enactment, seem to put the matter beyond the reach of controversy.* In the following passage of an old treatise, "Concerning Suits in Chancery," the Chancellor is supposed to be himself answerable

* Proceedings in Chancery printed by authority of the Commissioners of Public Records, p. 11. 12.

for the costs, unless he follows its provisions. “First, if the Chauncellor grante a subpœna, and taketh no suritie that the plaintiff shall satisfy the party grievèd for his damages, if the matter in the bill be not founde true, and after the matter is founde againste the plaintiff, and he is not sufficiente to yelde damages to the defendant, I think that in that case the Chauncellor is bounde in conscience to yield damages himself; because he took no suritie at the grauntinge of of the *Subpœna*, as he should have done by reason of the statute made in the 15th year of King Henry the 6th, the 4th chap. whereby it is enacted, that no subpœna shall be graunted tyll suritie be founde for the truthe*.” Except in a few cases no security is now given for costs either at Common Law or in Equity. According to the present practice in Equity it cannot be asked. No security is now given unless the plaintiff has quitted, or means to quit the jurisdiction. In another instance the hardship is still more severe. If the plaintiff should be unable to pay the costs, or die before the costs have been taxed, the defendant has no claim either at Common Law or in Equity against his executor, and the injury he sustains is irremediable.† In actions at Common Law also, plaintiffs who have no permanent residence in this country, frequently bring actions which entail heavy expence upon the defendant,

* Printed among Hargrave’s Law Tracts, p. 348.

† See cases quoted in 2 Mad. Equity, p. 530.

which their inability or departure prevents from being ever made good against them. Justice seems to require that the law in this respect should be restored to its original state, and that defendants should be relieved from a serious risk to which they have been exposed, perhaps without much necessity or consideration.

2. As both courts of Common Law and Equity ought to have the power of obliging the plaintiff to give security for costs, it seems still more expedient that courts of Common Law should have the means of preserving and protecting property pending litigation. However unaccountable it may be thought, the fact certainly is, that they have no means of effecting either of these objects; and the market of a saleable commodity may be lost, or the substance of a perishable one destroyed, without any court of Common Law being able to take a single step for its preservation or disposal. When any interposition is required, recourse must be had to the court of Chancery, which cannot be done without great delay, expence, and inconvenience. Why then should not courts of Common Law be empowered to make such orders as the exigency of the case requires? It seems that the possession of such a jurisdiction would be both convenient and becoming; and though it might occasion the appointment of some new officers, there seems no reason to apprehend that they would alter either the constitution or functions of the tribunals to which they might be made subservient.

3. Courts of common law and Equity ought to have greater powers in awarding costs. The rule adopted in most cases at Common Law is, if the plaintiff recovers nothing against the defendant, he pays the defendant's costs: if he recovers above 40 shillings his costs are paid by the defendant: and if the plaintiff recovers damages, but not to the amount of 40 shillings, each party pays his own. In Equity, the general rule is, that costs are entirely in the discretion of the Judge, and are awarded either against plaintiffs or defendants, whenever their conduct is so unconscionable as to merit that mark of the court's disapprobation. To the principle of these rules no objection can be made. In themselves they are just. The grievance which is felt results from the manner of their application. When costs have been awarded, the bill of costs then comes to be taxed, and the person by whom the costs are received then perceives to his surprise and mortification, that many of the items of which the bills of costs consist, are of a nature which by the technical rules of courts of Common Law and Equity, the party who was condemned in costs, is not obliged to pay. This practice appears to be a substantial contravention of the principle on which it is founded. Allowances which are adequate at one time, may from an alteration in the value of money, length or shortness of proceedings, the mode in which they are conducted, or any other cause, become either excessive or inadequate at another. When one party has acted so that he is decreed to pay

the costs of the suit to another, there is scarcely any rule of justice which ought to be more invariably observed than that when full costs are given, they should cover every charge which the party receiving them has reasonably incurred. The payment of costs is always important, and frequently the most material matter in the cause. What these costs are, it is not difficult to ascertain. They can be neither more nor less than those which the course of practice points out to be necessary in the conduct of causes of a similar kind and magnitude. If a client retains more than the usual number of counsel, or gives them an extraordinary remuneration, this ought not to be allowed to swell the bill of costs which an adversary is obliged to pay, but it ought to include every charge, to which, according to established usage, he is in any way subjected. In this position no gaining party is ever now placed. Both in courts of Common Law and Equity, the party to whom costs are awarded, however laudable his conduct may have been, and however blameable that of his opponent, invariably finds himself at the conclusion of the suit, a considerable loser; and in some courts, as for instance in the court of Exchequer, the very phrase of costs *as between solicitor and client*, is absolutely unknown. It is also established by immemorial usage, that in all causes between the crown and a subject, the crown never either pays costs or receives them. That this privilege now forms part of the royal prerogative, there can be no question, and it is also possible that objections may be stated against any

interference with it, of which none but those who are conversant with crown business can be sufficiently apprised. But to common observers it seems that no single point could be mentioned, where the crown would lose so little, and individuals would gain so much by the abandonment of an apparently oppressive privilege. In fact the continuance of this branch of the prerogative is of little use to the crown, for while it seems at first sight to be rigorously maintained, in most of the cases which occur it is virtually surrendered. In all revenue actions brought by the Boards of Customs and Excise which are afterwards settled by compromise, amounting probably to a half of the whole of those which are brought against subjects on behalf of the crown; it was formerly an invariable preliminary condition, that the costs incurred by the crown solicitor should be paid by the defendant. That practice has now been dropped in appearance, though in reality it is still observed; for whenever a defendant comes to a compromise with the crown officers before trial, he agrees to pay to the crown a certain fixed sum, in fixing which the amount of the crown solicitor's bill is as regularly taken into account as when its discharge formed one of the specific stipulations of the compromise. Should it be urged that the integrity of the crown law officers is a sufficient guarantee against the oppressive exercise of this privilege; the weight which may belong to this consideration, will by all who are acquainted with their characters, and the jealousy with which their conduct is watched, be un-

reservedly admitted. Still however all men are subject to inadvertence and error, and condemnation or acquittal by the judge or jury, is and ought to be the only judicial test of guilt or innocence; and whatever the moral presumption may be, it ought not to be in the power of the most merciful and scrupulous public officer, to load a defendant with the expence of defending himself against a civil action, unless in those cases where he proves him guilty. In Equity the crown receives costs, though it does not pay them. The doctrine maintained there has lately been distinctly announced by the present Vice-Chancellor. “ It is said that although this result may not have “ been in the contemplation of the Legislature, it “ is the necessary consequence of a general principle that the crown can neither pay nor receive “ costs. I find no such general principle in courts “ of Equity. The Attorney-General constantly receives costs where he is made a defendant in “ respect of legacies given to charities; and even “ where he is made a defendant in respect of the “ immediate rights of the crown in cases of testacy. And where charity informations have been “ filed by the Attorney-General, costs have been “ frequently awarded him in interlocutory matters, independently of the relator. And this “ supposed general principle which is asserted by “ the defendants, is not maintained by any decision “ or by any dictum which appears in any reported “ case. Collecting the law of the court in this case “ as in others from its practice, I am of opinion, that

“ although the Attorney-General suing in the dis-
 “ charge of his public duty could never be made
 “ to pay costs in a court of Equity, yet it is not
 “ the rule of a court of Equity that he cannot re-
 “ ceive costs, and that the defendant must in this
 “ case pay his costs. It is hardly necessary to
 “ to notice the reference that has been made to
 “ the case of costs in a court of Law. In those
 “ courts, costs *eo nomine* were unknown to the
 “ Common Law, and were recovered only by in-
 “ creased damages. The statute of Gloucester,
 “ which first gave costs expressly, did not extend
 “ to the King, because he was not specially
 “ named, but it was expressly provided by 33
 “ H. 8. c. 9. that the King shall recover his debt
 “ with costs.”* The explanation here given of the
 origin of the peculiar situation in which the crown
 stands with respect to costs, strengthens every
 objection which can be urged against its continu-
 ance. It shews its introduction to have sprung in
 a rude age out of a technical doctrine of the Com-
 mon Law, and the relinquishment of it considering
 our present habits and opinions would neither affect
 the crown in its patrimonial interest or dignity.
 It can be no more derogatory to the dignity of the
 crown to contend about costs, than to contend with
 smugglers and contraband traders about fines and
 penalties, or the forfeiture of soap, candles, to-
 bacco, or spirits, by which the costs were occa-
 sioned. But in reality, the dignity of the crown is

* 1 Symons' and Stuart's Rep. p. 396.

in no degree implicated in the matter. It is a mere question of expediency whether the right which the crown now enjoys, should be maintained or abandoned. The crown acts by its officers for the benefit of the public, and as it submits to come into courts of justice to have its claims heard and determined like those of any other suitor, there seems no reason why it should not give and receive costs in the same manner. Instead of the gracious and voluntary surrender of this anomalous and obnoxious immunity depriving the crown of a really valuable or splendid appurtenance, it seems difficult to conceive any measure better calculated to enhance its real dignity, or to strengthen its hold upon the esteem and affections of the people.

As the King pays no costs when he proceeds in courts of Common Law or Equity by his proper officers, neither does the House of Commons when it institutes an unsuccessful impeachment against any individual before the House of Lords. From the tediousness and solemnity with which a trial of this description is necessarily conducted, it must be burdensome even to the wealthiest individuals in the state, and absolutely ruinous to every other person. How it has happened that the House of Commons has never had the justice or generosity to defray the expence of those whom it has ineffectually prosecuted, is a curious fact in the history of a country so tenacious of the character and tendency of its judicial institutions. It would have been more natural to anti-

cipate that as it had failed to substantiate the charge it had been induced to make, and could offer no compensation for the distress and anxiety of mind it had entailed, that it would have been impatient to make that pecuniary reparation which it has in its power to bestow. It is difficult to suggest any reason for the adoption of a contrary line of conduct but that which has been already alluded to in the case of the law officers of the crown. It may be said that whether it succeeds or not, it is not to be presumed the House of Commons will institute any impeachment without sufficient foundation: that such trials are so rare it is not worth while to alter the established practice on their account: and that the charge which it entails upon individuals has in no instance been either claimed or publicly stated as a grievance. Allowing all the weight to these reasons which they can properly receive, they do not appear to be satisfactory. The law of England, conformably to the dictates of sober reason and comprehensive policy, reposes implicit confidence in the justice and wisdom of no public men either in their single or collective capacity, and permits no insinuations to be directed against the innocence of those whom a competent tribunal has previously acquitted. Nor will it be found upon a retrospect of our history within the last hundred and fifty years, that prosecutions of this sort have been so rare, or the motives of those who urged them so unsuspected as is generally assumed. Within the period just specified there have been no fewer

than six or seven impeachments, and if only one case had occurred, the severity with which it pressed upon its victim would only have become the more conspicuous. The less frequent such proceedings and acquittals are, the less would the reimbursement of the defendant's costs be felt by the public, and the more unreasonable is it to suffer them to remain upon the shoulders of those who sink beneath them. The injustice would not be the less glaring if an example of it occurred only once a century. Not one of the impeachments which have taken place since that of Lord Clarendon have cost less than £20,000 or £30,000, and that of Mr. Hastings is said to have been near £100,000. Indeed every one of them has either totally destroyed, or irretrievably injured the fortune of him against whom they were directed, and the absence of all complaint, seems to prove rather the magnanimity of the sufferer than the moderation of the suffering. Looking at the subject merely as one in which the fair and equitable administration of justice is concerned, it seems wholly inconsistent with the manliness and generosity of a great and free country, to allow any branch of its legislature at its own will and pleasure to direct its concentrated skill and influence against a solitary individual, and to crush him by the expence of the trial, though they had failed in making good the accusation.

4. Another remedial act would be to enable courts of Common Law and Equity to carry their decrees more effectually into execution. Where

trustees in whose names stock is invested are out of the jurisdiction, obstinate, bankrupt, or lunatic; an order for its transference may now be obtained by 36 Geo. 3. c. 90,* and in Ireland by the Irish statute, 23 Geo. 3. c. 35. This is beneficial in itself, and a precedent for further amendments. The means which the court of Chancery employs to enforce its decrees for delivery of the possession of lands, is by a writ of assistance directed to the Sheriff, and first used in the time of James I. In other cases it is by process of contempt *in personam*, or by attachment and sequestration.† “Sequestrations,” it is said, “were not heard of till the Lord Coventry’s time, when Sir John Read lay in the Fleet with 10,000*l.* in an iron chest in his chamber, for disobedience to a decree, and would not submit and pay the duty. This being represented to the Lord Keeper as a great contempt and affront put upon the Court, he authorised men to go and break up his iron chest, and pay the duty and costs, and leave the rest to him, and discharged his commitment. From thence came sequestrations, which now are so established as to run of course when all other process fails, and is but in nature of a grand distress, the best process at common law after a summons, such as a *sub-pœna* is. What need all the grievance and de-

* See Lord Rosslyn’s recommendation, 3 Vesey’s Rep. p. 24, in consequence of which the bill is supposed to have been passed.

† 1 Vesey’s Rep. 454.

“lay of the intervening process?”* In many respects, however, the power which courts of Equity have obtained by the process of attachment and sequestration, is manifestly insufficient.† To make the process of courts of Equity in furtherance of their orders and decrees more general and effectual, Sir W. D. Evans has proposed, “That it should be competent for any court of Equity to make any decree or order respecting the estate and interest of any person under 21, as if such person had attained that age, and in case the consent or act of any person under 21 be required, to order the same to be given or done by or on the behalf of such persons as if they were of full age—That any mortgagee shall be entitled to apply to Equity, that unless the mortgage shall be paid within a given time, the property mortgaged may be sold, and that the conveyance to him who purchases from the mortgagee, may be completed without the concurrence of the mortgagor—That where courts of Equity shall declare any hereditaments subject to the payment of any sum of money, they shall be authorised to sell or mortgage the whole or a competent part of them, and that the conveyance of them by a proper officer should to all intents and purposes be valid and

* North's Life of Lord Keeper North, v. ii. p. 73.—See also Swanston's Reports, v. iii. p. 282, for the History of Sequestration.

† 1 Vesey's Rep. p. 182. Dickens's Rep. p. 107. 3 Vesey, Jun. Rep. p. 24.

“ effectual. —And that any person ordered by the
“ decree or order of a court of Equity to execute
“ any instrument, and shall be unable on account
“ of illness or absence, or refuse or neglect so to
“ do, to order the same to be executed by a proper
“ officer, and to give the same effect to such exe-
“ cution as if it had been that of the person di-
“ rected to execute.”*

The complaints of the insufficiency of the powers possessed by the courts of Common Law for enforcing their decrees are of still longer standing. “ It is objected, that when the plaintiff hath judgment and execution in a suit, he can hardly get it executed by the sheriff; or if he can, he can hardly come by the monies when the sheriff hath it, for he will, if he please, make the plaintiff stay a long time for his return, and when he hath taken goods in execution, put the plaintiff to have a new writ to force him to sell them. It is offered as to the cure of all these things to be considered, that an inquiry be first made by a jury what the defendant’s estate is, and where it lieth, what his debts are, and where he hath lived, and how he is become in debt, and whether any of his debt be paid; and this being returned, that execution be made as followeth :— That all the estate of the defendant be liable to execution upon a judgment as it is upon a statute; and that in both cases lands entailed and copyholds be liable to the execution as well as

* Evans’s Statutes, v.

“ any other lands ; and that the debts due to him
“ also be liable to execution : and that the lands
“ and goods that others have in trust for him be
“ liable to execution also ; and that the lands he
“ hath for another’s life, or any other way at his
“ disposal.”* Some of the evils here specified
are now redressed, but others remain without
any alleviation. No beneficial alteration of this
nature ought to be overlooked ; for the prompti-
tude and energy with which the judgments, or-
ders, and decrees of courts of justice are carried
into execution are among the chief means by
which the bulk of the community judge of their
dignity and efficiency.

5. Courts of Law and Equity should be ena-
bled more effectually to punish the malversation
of their own officers. The power of punishing
those who are officers of Court, or practising be-
fore it, is an authority which may be abused, and
which it is neither easy nor agreeable for a judge
to exercise. At the same time it is indispensably
necessary for the preservation of that correctness
of conduct and strong sense of propriety which
it is so desirable to cherish among all practi-
tioners, that a power of inflicting punishment
upon them should be deposited with the judges,
especially those of the supreme courts, and that
it should also be exercised whenever a case of
palpable misconduct demands its exertion. An
action of damages which is now competent to

* Shepherd’s England’s Balme, p. 85.

the injured party, is inapplicable in half the cases that occur, and even where it does apply is well known to be completely nugatory. No effectual check remains but that censorial authority which every supreme judge ought to possess in cases of malversation over his officers, and if this were used with temper and resolution in the only way in which it can be usefully exercised, which is by depriving barristers, solicitors, and attornies of their rank, and prohibiting them from ever practising in any court of justice again, the effect of it would instantly be felt in every branch of the judicial system. Recourse ought to be had rarely and with great reluctance to this extreme remedy, but there can be little doubt it would have been for the benefit of suitors, and perhaps also for that of practitioners themselves, if it had been more freely used than it has ever been. When barristers or solicitors do not scruple for their client's benefit to avail themselves as far as they can of the doctrines of the law and rules of practice, however inconsistent with justice or foreign to their spirit and intention; and avow themselves warranted in their professional capacity to do that upon which in their private characters they would not venture, it is time to endeavour to rekindle that sense of rectitude and honour by which the legal profession has in this country been so long animated and distinguished.

6. In the establishment or extension of some legal and equitable jurisdiction for the recovery of small debts.—Except in those large towns where

courts of Conscience are established, and in a few cases where jurisdiction is given to the county magistrates by statute, there are at this moment no Courts in England where sums below ten and fifteen pounds can be recovered, without incurring an expense which the debtor or creditor is totally unable to bear. The consequence is, that the fraud and dishonesty of a bold and wealthy man go unpunished, and justice is almost wholly withheld from those who stand peculiarly in need of its assistance. Unless the fact were notorious, it could hardly have been believed that so extraordinary a deficiency would have been so long permitted. Public attention has at last been directed towards it, and the favour with which Lord Althorpe's bill for the establishment of a new jurisdiction for the recovery of small debts has been received, proves the interest which it has at last excited. To what sum of money the cognizance of such a Court should reach, and whether the desired relief should be administered by an entirely new jurisdiction, or the extension of one already existing, requires much deliberation. The disadvantage of multiplying jurisdictions and orders of judges has been adverted to already, and one would have thought that the quarterly sessions of the magistrates in one or more places in each county, and the courts of Conscience which are spread all over the kingdom, might have rendered the establishment of a third jurisdiction unnecessary. The court of Quarter Sessions is that on which the additional burden would most naturally fall;

and if by a simplification of the law, the duties now discharged by county magistrates could be so far diminished as to admit of this addition, perhaps small debts might be recovered before them at as little expense, with as little trouble and delay, and as much to the satisfaction of the parties as by that plan which is now under parliamentary consideration. The subject need not be pursued further in this place, as it will again come under consideration.

7. In enabling the judges in courts of Common Law and Equity to compel witnesses to attend and give evidence in foreign causes where a commission for the examination of witnesses has been issued into this country, and to certify to foreign courts what the law of England is, upon those points which arise in depending causes, and on which they may desire their certificate. The three parts of which the United Kingdom of Great Britain and Ireland is composed, still stand in matters of justice in the relation of foreigners to one another; and no judge in England, Ireland, or Scotland, has the power of compelling the attendance of witnesses beyond his own jurisdiction; or of certifying to any judge of the other two jurisdictions, what the law within his own jurisdiction is. These are not only theoretical defects, but serious practical evils, which the increasing connection and intercourse between all parts of the kingdom render every day more sensible. "This is one of the cases," as Lord Hardwicke said respecting England and Scotland

nearly a hundred years ago, “ that shews the
“ union of the two kingdoms not yet complete;
“ and really as the union already made has
“ caused a greater intercourse than when divided,
“ and more frequent marriages and alliances,
“ there happens to be such a communication of
“ rights between the two kingdoms, as makes
“ this separation of the laws and jurisdiction of
“ the Court attended with great inconvenience
“ and difficulty.”* The Commissioners appointed
in 1823 to inquire into the courts of law in Scot-
land, have accordingly strongly recommended the
adoption of some measure for compelling wit-
nesses to attend and be examined in case of com-
missions in Scotch causes being issued into Eng-
land.† The 45 Geo. 3. c. 92, section 2, which
compels the attendance of witnesses in criminal
cases in any part of the united kingdom, favours
this suggestion, and if adopted, it ought to be
reciprocal between the whole of the three divi-
sions of which the kingdom consists. If the
judges of the supreme Courts of England, Ireland,
and Scotland, had also the power of sending
cases to each other when occasion required, and
certifying what their respective laws were, it
would be more satisfactory than to obtain the
requisite information by sending a case for the
opinion of one or two lawyers, and could in

* 2 Vesey's Reports, 385.

† P. 16, printed in 1824.

general be asked and granted without ceremony or inconvenience.

There seems no reason why this courtesy with respect to witnesses and certificates, which it would be so useful to establish throughout the three component parts of this kingdom, should not be extended to all foreign states with whom we are in relations of peace and amity. It is true that witnesses so examined could not perhaps be prosecuted for perjury; but even though they could not, the examination would be received by the parties with extreme thankfulness, and be productive of the best effects. The certificates of the judges could only extend to cases coming from a known court, and confirmed with every mark of authenticity. The courtesy so shown would often be very material to our subjects suing abroad, and would call forth corresponding good offices from foreign courts when our judges wished to know the state of any foreign law in return. Few measures would more easily or powerfully contribute to the advancement of international law and good will, than if the tribunals of independent states were rendered able as well as willing to aid and assist each other in the attainment of their common object. Instead of evincing any disposition to encourage or anticipate each other in so honourable and praiseworthy a career, most of the governments of Europe, mistaking their real interest as well as dignity, have secretly gloried in the display of

their own illiberality and indifference. It is time that princes, statesmen, and judges, should acknowledge and retrieve their error. The interchange of acts of kindness between governments as well as private persons, is not more clearly dictated by good feeling than by sound policy. The law of nations even at this day remains in a very rude and imperfect state. It is no doubt true that looking back to the period when the soldier enriched himself by the ransom of the captives which he had made in war, and the prince seized for his own use the property of every alien who happened even in the time of peace to die within his territory, the law of nations has made signal progress in improvement. But it has greater still to make, and its advancement would be materially promoted by the cordial and universal co-operation of governments and judges to encourage the discovery of truth and suppression of injustice.

SECTION III.

Of the simplification of the Law of Real Property.

THAT branch of the law of England which relates to the acquisition, transmission, and incumbering of real property, is perhaps of all subjects within the range of art or science, that upon which it is most difficult to reason accurately and comprehensively. It is so extensive and repulsive,

that it has scarcely ever been approached except by those who conceived themselves practically interested in proclaiming the excellence, lengthening the forms, and multiplying the mysteries of the system. To add to the difficulty of the investigation, its component parts are so connected and interwoven, that none of them can be touched without all the rest being in some degree affected. Instead of endeavouring therefore, to subvert it at once by any precipitate and fundamental alteration, it would probably be a more successful and less hazardous course, to pull down one by one those parts of it which are inconvenient or useless, beginning with those of which the removal may be effected with the greatest ease and safety. By this method of proceeding, one improvement would naturally make way for another, and conveyancing would gradually increase in convenience as it gained in simplicity and beauty, by the suppression of the uncouth and superfluous devices by which it has been so long disfigured and perplexed. In conformity with the course which has been pursued when other parts of the law have been under consideration, some improvements in conveyancing may now be adverted to, which it seems to be desirable to effectuate.

1. The first of these is, that the instruments used in conveyancing should be drawn with greater brevity and perspicuity. From the earliest existing allusion to a title by which “the field of Ephron, “ which was in Machpelah, which was before “ Mamre, the field, and the cave which was there-

“in, and all the trees that were in the field, that
“were in all the borders round about, were made
“sure to Abraham for a possession,” down to the
present day, the conveyances of all countries have
been needlessly verbose. Without inquiring from
what causes or by whose means this has been
brought about, the extent to which it is now car-
ried in England has almost become intolerable.
Legal instruments are so spun out by repetition
and circumlocution, that they are said to have
increased to nearly twice their former size within
the last five and twenty years. There is scarcely
any written instrument in which this defect is not
perceptible. The objects of a deed are so lost in
the sea of its provisoes, that it is by no means un-
common to prefix to it an abstract of its own con-
tents. The mischief caused by this profusion of
words is incalculable. It enhances expense, in-
creases delay, confuses the parties, and swells and
protracts every dispute which arises afterwards
concerning them. Each instrument has not only
become longer than it needs, but the law of pro-
perty most unnecessarily compels their multipli-
cation. A stronger instance of this cannot be
given than that afforded by *a lease and release*,
which is the most common form by which real
property is now conveyed to a purchaser. This
method of conveyance is said to have been first
contrived by Serjeant Francis Moore at the request
of the Lord Norris, “to the end that some of his
“relations should not know what settlement he

“had made.”* It seems impossible to figure any end which can be answered by rendering the execution both of a lease and release necessary at the present time, unless it be to double the profit of solicitors and conveyancers. It is in vain to expect that the wordiness to which lawyers are so prone should be easily or entirely corrected. But though it cannot be totally repressed, the legislature might restrict both the length and number of deeds and conveyances, and perhaps also devise measures for their abbreviation. One of the means which might be suggested for this purpose is an alteration in their form. The unbroken narrative which runs through deeds and instruments from beginning to end, is the most inconvenient possible manner in which they could be drawn up. Both clearness and succinctness would be consulted by breaking down their contents into the separate articles or heads of which they consisted, and prefixing a numerical figure to each. These different heads or articles would then stand separate and distinct; the breaks between them would promote perspicuity; and the numerals prefixed to them would render reference to them both sure and easy. It may also be fit for consideration whether it be not inexpedient that the preparation of legal deeds or papers of any description should be paid for according to their length. The mere quantity of work done is the rudest of all ways of esti-

* Barrington's Observations on the Statutes, p. 133.

mating the remuneration to which it is entitled, as the time and skill which has been bestowed upon it is usually in an exactly inverse proportion. No man ought to receive a greater recompense than is suited to the degree and quantity of the skill and labour employed, and he ought not to receive a smaller whatever may be the extent of paper which that labour may have covered. Whether the establishment of any kind of *quantum meruit* be practicable or not, its impracticability can be received at present by none who do not desire to believe it. In addition to these suggestions, there seems no reason why forms for the most common deeds and instruments might not be carefully prepared and published by the legislature, and conformity to them constantly and vigorously enforced. Scarcely an act of parliament is passed respecting any public matter, in which forms are not prescribed by public authority, and conveyancing is quite as fit a subject for them as any other. If by this expedient; by a different manner of remunerating those by whom deeds and instruments are drawn; or by any other means, the superfluity of words which is found in them could be in any moderate degree retrenched, one of the most obvious, vexatious, and universal grievances in conveyancing would be effectually corrected.

2. The enfranchisement of copyholds is another step by which the law of real property would be decidedly improved. It is not necessary to enter into any detail of the peculiarities by which that species of property is distinguished; the fines and

forfeitures to which it is subject; nor the inconsistencies and absurdities to which the continuance of it has given occasion. Nothing can exceed the cogency of the observations with which Mr. Watkins has summed up the two of the last elaborate volumes he has devoted exclusively to this subject. “ Upon the whole, therefore, the
“ law of copyholds seems founded upon principles rational and just in their origin, and perfectly adapted to the manners of the age and people among whom they were established. The right of the landlord to his fines and his forfeitures, his privileges and emoluments, remains indisputably good. As copyholds were at the will of the lord, it belonged to the lord to affix the terms of his gift. The ancestor accordingly accepted the gift, and was thankful: and the heir who now enjoys ought not to murmur because he has not more than his forefathers, and but for whom he would have had nothing to hold; and more especially, as the alterations that a change of manners has introduced, have been uniformly for his benefit. The courts have established his right to succeed; have established his *right* to alien. They have even relieved against forfeitures, and restricted the lord in his fines. The purchaser has no better cause to complain: he knew, or ought to have known, the terms to which the lands were subjected. He purchased with his eyes open; and if he has made a bad bargain, it can only be the consequence of his own indiscretion. If

“ the lands are less valuable than freehold, he has
“ paid a consideration for them proportionably
“ less.

“ But on the other hand it must be evident,
“ that though the principles on which the doc-
“ trine of copyholds is founded, were originally
“ wise in themselves, yet that many of them are
“ now obsolete, and many forgotten. The neces-
“ sity and even propriety of their continuance
“ has ceased to exist. We have now no villeins,
“ thank God; and the laws which could relate
“ only to villeins ought therefore to be swept
“ away. But the progress of manners is always
“ gradual, and often imperceptible; and hence a
“ system is frequently continued when its princi-
“ ples are disowned. The wisdom and expediency
“ of a general law, to which all landed property
“ should be alike subject, and the confusion and
“ manifest evils which are inevitably attendant
“ on a diversity of local customs, must be appa-
“ rent to every one. A nation can scarcely expe-
“ rience a greater curse than a complicated and
“ discordant code; for, according to the remark
“ of an ingenious and elegant writer, ‘ *so soon as*
“ *justice becomes a science, so soon does injustice be-*
“ *come a trade.*’ The more varied and complex
“ the laws, the less they must necessarily be
“ understood; and the less they are understood,
“ the more will the artless and innocent be placed
“ in the power of the artful and rapacious. As
“ we have manifestly outlived the principles of
“ copyhold law, why should that law be con-

“tinued? The happy consequences of the statute
“of the 12th of Charles the Second which abo-
“lished so many feudal incidents, and turned the
“generality of tenures into that of common so-
“cage, hold out to us the strongest encourage-
“ment to reduce our laws of real property still
“more to the standard of wisdom, by reducing
“them to the spirit and manners of the times,
“Why must we be perpetually appealing to the
“fool’s idol of precedent? Why be dissatisfied
“with common sense? May not what was just
“at one period become under other circumstances
“unjust? Or will truth be no longer truth, be-
“cause our forefathers happened to blunder? Or,
“finally, may not that which was wise in the in-
“fancy of a state become inapplicable when men
“cease to be rude? There are many difficulties,
“it is true, in the way of a general enfranchise-
“ment: but what is there of general importance
“that can be effected without having difficulties to
“encounter? Without amelioration we must de-
“generate. A system of jurisprudence cannot
“remain perpetually the same, while the man-
“ners of a nation change. The principles which
“originated in barbarism, cannot meet the wants
“of an improved and improving age. The man-
“ners of a nation must be stationary, or stationary
“laws cannot long regulate its conduct. The
“principles of nature are fixed and immutable,
“and laws founded on those principles will always
“apply; but laws founded on arbitrary imposi-
“tions, or the peculiar manners or necessities

“ of a particular age, should not be permitted to
“ shoulder out common sense from society, or
“ to incumber the conduct of persons to whom
“ they cannot in reason relate. If every thing
“ desirable cannot be effected, it does not fol-
“ low that we might therefore do nothing. If
“ an immediate and universal enfranchisement
“ of copyholds cannot be accomplished, an en-
“ franchisement may be effected partially and
“ by degrees. The more we advance towards
“ perfection, the number of evils which we leave
“ will be less. Thus an act may be passed,
“ obliging every landlord seized *in fee simple* to
“ enfranchise, on so many years average of the
“ seignorial emoluments. The average may be
“ ascertained by commissioners on a jury. *Tenants*
“ *in tail* may also be enabled and compelled to en-
“ franchise, as enfranchisement would be so evi-
“ dently beneficial to the nation at large. A tenant
“ in tail may now by certain means alien *the manor*
“ in fee: what impropriety then would there be
“ in enabling him to convey the freehold *of a few*
“ *copyhold tenements* by some solemn deed? And
“ the power of enfranchisement might be ex-
“ tended as circumstances would admit. The
“ prejudices of the ignorant, and the opposition
“ and arts of the interested must be expected and
“ met; but we should meet them with manly
“ firmness, while conscious of the integrity of our
“ views. We should recollect that we cannot
“ reason from a matter of fact to a matter of
“ right; and that it does not follow of necessity

“ that because absurdities or inconveniences exist,
“ they therefore ought to be cherished. There
“ cannot be a more certain cause of destruction
“ than the accumulation of what is absurd.”

To these powerful observations I shall only add, that as far as the pecuniary interests of landholders is concerned, the enfranchisement of copyholders would be a decidedly beneficial measure. Those who draw only from 100*l.* to 200*l.* a year from the copyholders, find the emoluments little more than sufficient to cover the charges incidental to the maintenance of the baron's court; and in all cases more money is spent uselessly both to landlords and vassals in this way than in any other formalities which the law requires. To lords therefore it would in every instance bring an accession of fortune, and to copyholders great and grateful relief. They would be for ever freed from the endless interference attendances and exactions to which they are now obliged to submit, and which under the mildest form and management continue so galling and inconvenient, that there are few copyholders who would not gladly commute them for an equivalent far beyond their real value. Since the enactment of 12 Charles 2. c. 2. which put an end to feudal holdings and their appendages, it might have been expected that copyholders would long ago have been suffered to participate in the blessings which it brought, as they stand in precisely the same relation to the lord of the manor that the lord of the manor before the passing of that act did to the king;

and when the lord's own feudal bondage was remitted, one does not see upon what principle of justice and reason he should refuse, upon tender of a fair equivalent, to remit that which his own vassals owed to him. Such a measure would be as advantageous to the country at large as to the private parties more immediately interested. It would admit copyholders to the elective franchise, their exclusion from which is the greatest grievance of which they now complain; it would preclude all future disputes about timber, mines, game, and heriots, which do more to destroy peace and good neighbourhood than all other causes of difference put together; and would promote the accumulation and investment of capital, by giving every man the absolute and unlimited enjoyment of property which he already felt to be substantially his own. The 55 Geo. 3. c. 192. which enabled a copyholder to dispose of copyhold property, though not surrendered to the use of his will, stopped much of that litigation which copyholds had previously occasioned, and it is to be hoped that many years will not elapse before their complete enfranchisement will close the door upon all the rest.

The same reasoning which applies to copyholds in England applies with equal force to joint tenants, as well as to leaseholds perpetually renewable, in Ireland, and in both cases it is time to destroy as many links as possible of that chain of dependence which is found so inconvenient wherever it is suffered to exist.

3. By the abolition of *Seisin* and substitution of *Registration*.—Blackstone describes livery of seisin to have “perpetuated among the tenants of the “homage the æra of the new acquisition at a “time when the art of printing was very little “known, and therefore the evidence of property “was reposed in the neighbourhood, who in case “of a disputed title were called upon to decide “the difference, not only according to external “proofs produced by the parties litigant, but also “by the internal testimony of their own private “knowledge.”* The practical utility of such a solemnity at the introduction of the feudal system we are apt to forget. When the population of a country is scattered and unlearned, and the abundant leisure which they enjoy is chiefly employed in witnessing or recounting the incidents which occur in their neighbourhood, any ceremony which draws their attention to any particular occurrence, is the best method of giving publicity to it at the time, and insuring the recollection of it afterwards. Seisin therefore was an admirable institution in its day, but should have ceased with the state of society to which it owed its origin. A severe blow was given to it by 27 Hen. 8. c. 10. commonly called the Statute of *Uses*, by which a man, seised of lands, covenants in consideration of blood or marriage that he will “*stand seised of the same to the use of*” his child, wife, or kinsman, for life, in tail, or in fee. “Here the statute,” says Blackstone, “executes

* Commentaries, v. ii. p. 53.

“ at once the estate ; for the party intending to be
 “ benefited, having thus acquired *the use*, is thereby
 “ put at once into corporal possession of the land
 “ without ever seeing it, by a kind of parliamen-
 “ tary magic. But this conveyance can only ope-
 “ rate when made upon such weighty and inter-
 “ esting considerations as those of blood or mar-
 “ riage.”* These weighty and interesting con-
 siderations are however among those which are of
 most frequent occurrence and by which the great-
 est quantity of real property is conveyed ; and if
 seisin is dispensed with in that instance, and also
 in the case of property conveyed, by levying a
 fine,† it easily might and ought to have been so
 in every other. Its continuance is as inappro-
 priate now as its establishment was at first judi-
 cious. The subjects of this country are in the
 present day a busy and a reading, not an idle and
 a story-telling people ; and *Registration* of the
 written conveyance of real property forms at
 this day a confirmation of titles as natural and
 even more efficient than *Seisin* was in the days of
 our illiterate and turbulent progenitors.

Public registers of births, deaths and marriages
 have long been established with different degrees
 of accuracy in almost every state in Europe.
 Registers affecting land have also been esta-
 blished in Spain,‡ Holland, Scotland, and France.
 Registration is said to have been known in Eng-

* Commentaries, v. ii. p. 338.

† Id. p. 348.

‡ 3 P. Williams, p. 364.

land even prior to the Conquest, and grants to lands to have been then inrolled in the shire book in public shire-mote, after proclamation made for any to come in who could shew a preferable title to the lands conveyed.* This point has been supposed not to be satisfactorily proved; yet in the same passage in which its accuracy is questioned, the account which is given from Hickes's *Thesaurus* of the transaction which took place between Thurkil and Leofleda, at the conclusion of which "Thurkil rode to the church of St. Ethelbert with the leave and witness of all the people, and had the same inserted in a book in the church,"† proves the early existence of a very effectual kind of registration, as well as a perfect comprehension of its value. No steps seem to have been taken towards its regular introduction till the 27 Hen. 8. c. 16. which directed the inrolment of transferences of real property made by bargain and sale, which act Lord Hardwicke alleges to have had the same object with the registration act of 7 Anne, c. 20.‡ Though no registration was till then actually established, it had been repeatedly proposed at antecedent periods. In 1652 or 1653 a bill was proposed for the establishment of county registers, as appears by a pamphlet which was published in 1653.§ The same or a similar mea-

* Gurdon on Courts-Baron, p. 589.

† Hallam's *Hist. of the Middle Ages*, v. ii. p. 141. 1st Ed.

‡ 1 Vesey's Rep. 66.

§ Reasons against the Bill for the Establishment of County Registers, p. 9.

sure was warmly recommended by Shepherd a few years afterwards, and the provisions then offered by him were to the following effect. “ It is objected, that there is no security for “ men’s lands or possessions; they can never “ say they are their own; but they may be “ molested by some former title to or incumbrances upon the land. It is offered to be “ considered for securing all men’s present “ titles to land, what an act of limitation to this “ purpose may do. That for all such as shall “ within a certain time enter their land, title, and “ estate in it in the county registry, having such “ title or estate, or at least a colourable title and “ estate, that if any person that hath or claimeth “ any estate or interest therein, or right or title “ thereunto, or charge or incumbrance thereupon, “ if they being free from impediment of coverture, “ &c. enter not their claim nor bring their action “ within such a time, that they may be perpetually barred. It is offered further for the security of titles and estates that every man that will “ in the conveyance of land and making of their “ assurances, may take them by fine or deed inrolled or not inrolled as the law is, so as there “ be a transcript of the conveyance certified into “ the registry, otherwise all conveyances and assurances of lands or profits out of it whatsoever, “ whereof there shall be no mention in the county “ registry shall be as to him that shall afterward “ purchase the same land or any profit out of it, “ adjudged fraudulent and void. And that there

“ be a county registry in every county, and one
 “ or more houses fitted for it, and officers ap-
 “ pointed to be chosen: the times set for the of-
 “ ficers’ attendance, that all these officers being
 “ desired shall forthwith enter and indorse the
 “ deeds according to the form set down.”* The
 adoption of the same plan was subsequently
 pressed by another writer after the restoration of
 Charles II., who proposed to remove the two main
 objections to it arising from its chargeableness
 and publicity, “ by the manner of contriving such
 “ a registry, for by extracting only the principal
 “ heads of such deeds the secrecy of the concern
 “ may be secured, and the charge likewise avoid-
 “ ed, viz. by a memorandum only that a deed was
 “ executed, bearing date such a day, &c. con-
 “ cerning such lands, (naming the parcels as in
 “ the deed,) in the parish and county, &c.—par-
 “ ties to the deed, such, &c.—witnesses, such and
 “ such, &c.—or to this effect.”† It is also men-
 tioned by the biographer of Lord Keeper North
 that this eminent judge “ was extremely desirous
 “ that a register of titles to land should be set-
 “ tled, and he worked seriously upon it. There
 “ were frequent attempts in parliament to esta-
 “ blish one, but none ever was presented to them
 “ tolerably digested, and so they came to no-
 “ thing.”‡ At last registers were established by
 act of parliament, about half a century ago, in

* Shepherd’s *England’s Balme*. London, 1657. p. 115, 117, 121.

† *Reasons for a Registry*. London, Harper, 1678.

‡ *North’s Life of Lord Keeper North*, p. 109.

Yorkshire and Middlesex, the two most populous and wealthy counties of England, where they have been placed nearly on the footing pointed out in the plan immediately above mentioned, and to these counties alone the introduction of them has hitherto been restricted.

The object of the preceding narrative is to shew, that the institution of a general system of Registration for the conveyance and mortgage of real property, has at various periods formed the subject of frequent deliberation as well as of legislative enactment in this country. It does not appear however to have by any means received the attention it deserves, or improvement of which it is susceptible. Perhaps no means could be made to conduce so effectually to the simplification and security of the conveyance of real property, as that of public registers. Whether registration should consist merely in an entry of the dates and purposes of the instruments and parties and witnesses to it, or in the inrolment of the whole of the deed itself, has led to considerable difference of opinion. An inrolment is alleged to be expensive and to cause an unnecessary disclosure of the circumstances of the parties.* Little practical inconvenience would be likely to result from all the publicity which inrolment would occasion. In so busy a country as this, people are too much occupied with their own concerns to interfere needlessly with those of their neighbours. No injury has resulted from the facility with which

* Sugden on Purchases, p. 603 and 604. 5th Ed.

every person in the country may get a copy of any will which has been proved in Doctors' Commons, and it may fairly be questioned whether any disclosure would really be occasioned, except in cases where it is desirable that no concealment should be practicable. The form and regulations of a registry however is a matter of subordinate importance. If it is only allowed that effectual registration of some sort or other should exist, no serious difficulties could be encountered in arranging its minute details. The expense attending a well regulated register would no doubt be considerable, but it would be amply repaid, if it in any degree fulfilled the purposes of its institution. The inrolment of the entire instruments would be attended with several very important benefits. If the originals were lost, the possessors of them abroad, or several parties had a concurrent right to their inspection or production, all of them would have constant recourse to the registry, and the possibility of the fabrication of any deed to the prejudice of prior incumbrances or parties interested would become impossible. But on this subject, and on the comparative merits of different plans of registration, it would be expedient to examine the manner in which they are now kept in Ireland, France, and Scotland, in all of which countries, registration is established. Some of the most experienced officers belonging to the Record Department in the Tower, and Mr. Thompson who has the superintendence of the Register House at Edinburgh, or

some of the other officers of that establishment, would also be able to give most valuable information on the merits of the different sorts of registration, and improvements of which it is capable. As land-surveying is carried to so much greater perfection now than in times past, it might be fit also to consider whether plans of the property sold or incumbered, together with an outline of the conterminous tenements, might not be made to save a great deal both of expence and writing. That it should ever be possible to transfer or encumber real property as easily as government stock standing in the books of the Bank of England is not to be expected, but there can be little doubt that by means of a well arranged register, plans, indexes, and calendars, exhibiting its situation, extent, and burdens by which it is affected, it might be conveyed at a fifth part of the delay, trouble, and expense with which it is now attended.

4. By laying down some legislative enactments respecting the transmission of real property by *operation of law* or *the will of the party*. If it should be thought practicable to adopt all or any of the measures which have been adverted to for the abbreviation of deeds, enfranchisement of copyholds, abolition of seisin, and introduction of registration in its stead, these changes of the law would not only be important in themselves, but would pave the way for still further and greater improvements. Among these might be reckoned the adoption of a few general and perspicuous

rules determining the manner in which real property should descend by law when not affected by any act of the last owner, and the power over its descent which he should be allowed to exercise by *deed* or *will*.

Respecting the *descent* of real property when the owner dies intestate, little requires to be said. The rules now established are sufficiently plain, and the alterations in them that could be suggested are neither numerous nor of prime importance. It has been already mentioned that there is an apparent hardship in preventing the half blood in all cases from succeeding to the whole, and the father from succeeding to the real property of his own son. It would also be desirable that the rules of descent should be the same all over the kingdom. The law of Gavelkind in Kent which divides the property equally among all the children; and Borough-English, which in a few spots gives it exclusively to the youngest, are peculiarities which it may have been desirable to respect in former times, but which there is no sound reason for enduring any longer. They are unjustifiable in theory, and attended with no beneficial effects in practice.

The degree to which private persons are permitted to govern the transmission and enjoyment of real property by writings which are to take effect during their lifetime or after their death, constitutes in England the most material part of the law of real property, and it is of great moment to the peace and prosperity both of individuals and

the state, that those parts of the law should be as strictly defined as possible, which relate either to the extent of the power which is given or the manner in which it may be exercised.

So far as the *manner* in which the power which private persons are permitted to exercise over real property by deed or will, is concerned, there are a few general maxims by the neglect of which this branch of the law of England seems to be greatly and unnecessarily perplexed. In the first place, why should not all that is permitted to be done by *will* be done equally by *deed*? If any distinction were to be made between them, one would naturally expect that a *deed*, as rather the more solemn instrument of the two, should have the widest sphere of operation. The case is exactly the reverse. By means of *uses* or an Executor's devise contained in a will, *a fee may be created upon a fee*, which in the instance of a *deed* the Common Law absolutely prohibits. Here then is one source of intricacy in the law of real property, both unfailing and abundant. In the next place *deeds* and *wills* should as far as the nature of the case will admit, be executed, proved, cancelled, and interpreted in courts of justice, in the same manner. In every one of these particulars the law of England is incumbered and disfigured by endless distinctions and anomalies, without any assignable cause which will bear investigation. In the execution of a *deed*, the signature of the maker is not necessary at all, though *sealing* and *delivery* are : but in the execution of *wills* of real

property, neither *sealing* nor *delivery* are necessary, but the *signature* of the testator is. There seems no reason for this difference, and still less for requiring these ceremonies when a single acre of land is conveyed by deed or will, while personal property to the amount of two or three hundred thousand pounds may be conveyed by a will written in the testator's own hand, without being either signed, sealed, delivered, or attested. With respect to the proof of *deeds* and *wills* of real estate, there are considerable differences between the practice of courts of Common Law and courts of Equity, and differences also between the proof of wills of real estate at Common Law, and that evidence which is required before effect is given to them in Equity, and wills of personal estate which are proved in the Ecclesiastical Courts. As courts of Equity have now conferred upon *personal* property many of the characters of *real*, and particularly by rendering it capable of being entailed to the same extent, it ought in reason to be disposed of by the same solemnities, and these solemnities to be authenticated in the same manner. It might also be expedient to make those rules which relate to the revocation and cancelling of *deeds* and *wills* apply equally to both sorts of instruments. At present these rules are neither clear nor uniform, and multitudes of suits have been brought into courts of Law and Equity in consequence. In particular, the presumption that the will of a testator is revoked when he afterwards marries and has children, appears

to be a doctrine among the most irreconcilable to general principles, of any to be found among the records of our courts of justice. By means of this presumption courts of justice arrogate the power of making wills for men under certain circumstances, which in express terms they abjure the power of doing under any. There can be no doubt that unprovided wives and children induced them to adopt the course which they have followed, but still it seems upon general principles of reason to have been erroneous. If it should be deemed advisable to enable courts of justice to make a provision for the near relatives of persons of substance who have from forgetfulness, or motives of resentment, been left destitute, it ought to be expressly conferred by the legislature; but till that is done, it will be difficult to shew upon what ground they refuse to carry into execution those provisions respecting a testator's property, which the law has enabled him to make, and which he has regularly exercised. The rules by which courts of justice are governed in the *interpretation of deeds and wills* are fully of as much importance as any branch of the law relating to them, and perhaps there is no part of our jurisprudence, where judicious legislative interference would be productive of more decided improvement. Although the decisions at Common Law or in Equity are frequently less irreconcilable with each other than a cursory perusal of them seems to indicate; on this point the unfavoura-

bleness of the opinion which is formed upon first impressions will not be diminished by more familiar acquaintance. The cases are so numerous that they defy quotation, and no ingenuity can shew the reasoning and decrees of the Judges to have been either rational or consistent. A few general inferences may be safely deduced from them, as for example, that wills are generally, though not invariably construed according to the testator's intention; that deeds or other instruments of a fiduciary nature are construed with considerably greater rigour; and that all deeds which are not fiduciary are construed according to the strict legal import of the words and phrases which the parties to the deed have thought proper to employ. But beyond this, little further certainty is to be obtained. Though *deeds* are always declared to be construed strictly, yet Hobart has said respecting the Common Law judges, "And here first I do exceedingly commend the Judges that are curious and almost subtile, *astuti* which is the word used in the Proverbs of Solomon in a good sense when it is to a good end, to invent reasons and means, to make acts according to the just intents of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the act:"* and in another case respecting the construction of certain deeds, Lord Hardwicke talks of the "prodigious latitude" which the precedents and

* Hobart's Rep. p. 277.

authorities of the court of Chancery allow.* On meeting with such expressions as these, it is impossible to read them or reflect upon them without regret. Why should judges be reduced to the necessity of using either *prodigious latitude* or *cunning*, or to become unjust in their interpretation of words in order to attain justice in the substance of their judgments? It is a well known and admired observation of Lord Hardwicke's, *that there is no magic in words*, and yet as the law stands now with respect to their interpretation, one perceives every where the most undeniable proofs of its unseen and mysterious influence. But why should not the whole of this at once ludicrous and potent incantation be dissolved, and writings of every kind be interpreted according to the intention of the parties? It would be desirable to be distinctly informed what inconvenience or just ground of alarm would result from such an arrangement, or whether they would be in any degree comparable to the multiplied mistakes and law-suits which spring from the law as it is now established. If wills are explained according to the intention of the testator, why should not every other written instrument be explained in the same manner? No instruments are more important than wills, none more complex, and none by which larger property both real and personal is disposed of. If either in deeds or wills, a word or phrase is used which

* 2 Ves. Rep. p. 210.

has a technical signification, unless it appears to be the intention of the parties to use it in any other than its technical signification, let that technical signification be applied to it; but if it unequivocally appears to be the intention of the person who uses it, that its signification should be different, to insist that the technical signification should prevail over that which the context shews to be manifestly intended, is an abuse of language which neither time nor precedent can sanctify. Unless the legislature permits a man to express his own meaning in his own words, it seems bound to prescribe a precise form of words for him. There seems no intermediate course for it to follow. The difference between ordinary language and the language of the law is frequently so slight in appearance, and so great in reality, that to permit a private person to use his own words, and yet attach to them the technical legal signification, is a species of deception which the legislature ought not to tolerate. The simplest and wisest policy seems to be, to interpret every written instrument, according to the plain intent and meaning which they bear; but if this is not approved of, the next best is to publish a set of forms and precedents, the slightest departure from which should deprive all writings of all effect or validity.

The *extent* of the power which the owners of real property are by law permitted to use over the transmission and enjoyment of it, is still more important than the manner in which that power is exercised. If the owner of real property disposes

of it absolutely, or with the reservation of a partial or temporary interest, it seldom happens that much embarrassment is occasioned. It is the introduction of trusts and entails in whatever form or manner they are created which has perplexed this branch of the law in most countries in Europe, and in that of England rendered it almost incomprehensible. The desire of prolonging or perpetuating their possessions in their name and family, by means of entails, trusts, uses, substitutions, or by whatever other name they may be called, cleaves so close to all mankind, that it is sure to be renewed as often as the security of government or state of the law afford an opportunity. Traces of it are perceptible in records of the most remote antiquity. The first epoch, however, in the civilized world, at which trusts were regularly introduced, was under Augustus. Their spread appears to have been so rapid, and the consequences so inconvenient, that the *Senatusconsultum Trebellianum et Pegasianum* were made in order to invest the person for whom the trust was created with all the qualities and privileges of a regularly appointed heir. Though perpetuities could not be attained by the means originally employed, others were afterwards devised for the same purpose, precisely as trusts in equity in England defeated the statute of uses passed in the time of Henry VIII. Accordingly in the 159th Novel, we are presented with a specimen of a bequest precisely similar in all material points with the entails which are at this day found

subsisting in almost every part of Europe. Within moderate limits, entails are prejudicial to no form of government whatever, and in states where a monarchical form of government is adopted, they are conducive to its stability and prosperity. But they require to be carefully restrained both with respect to their nature and duration. When entails are permitted to be carried to an extravagant length, they are productive of every imaginable evil. “Deeds and wills,” Lord Dyer has beautifully remarked, “are the laws which private men are allowed to make;”^{*} and they should neither be suffered to become complicated nor capricious. Besides the injury they do to the law, they produce exactly the same mischievous effects upon the higher classes, that poor rates do upon the lower. They make the different members of the same family independent of one another; encourage dissipation both among parents and children, because they know that their respective provisions will not be affected, whether their conduct be weak or wicked: and either through mistake or oversight, they often disappoint those very persons whom the creator of the estate tail particularly intended to favour. Entails of excessive duration have accordingly met with the disapprobation of all persons of sound and enlightened understanding. The observations of Muratori on this point are particularly forcible and appropriate: “Che vuol chiarirsi,” are

^{*} Vernon’s Rep. vol. ii. p. 337

the words in which he begins the chapter on substitutions, “ della superbia umana, non ha che da
“ leggere i vari testamenti, che tutti dì si fanno.
“ Quivi i testatori non solamente trasmettono la
“ roba loro a qualche erede, ma vogliono ch’ essa
“ si conservi, e passi ad altri mani, sustituendo
“ al primo erede altre persone determinate, sieno
“ discendenti, o trasversali, agnati o cognati, o
“ pure estranei, secondo la predilezion loro, e
“ vincolandola in maniera, che tutti i chiamati ne
“ godano più tosto l’ usufrutto, che il vero e libero
“ dominio. Chiamo io superbia quella di una
“ creatura destinata da Dio a vivere per pochi
“ anni sopra la terra, e a goder di que’ beni, che
“ o la fortuna o l’ industria ha portato in sua casa,
“ che voglia anche far da padrone d’ essa, giacche
“ non se la può portar dietro, non solamente al-
“ lorchè spira l’ ultimo fiato, ma per moltissimi
“ anni anche dopo la morte sua. E divien piu
“ questa ridicola, se si tratta di poche sostanze,
“ o se si vuol tramandare una tal disposizione
“ sino a i secoli a venire, e molto piu se *in infinito*,
“ come cantano alcune ultime volontà. Ben fù
“ detto, che l’ uomo e l’ animale della superbia.
“ Ecco come egli vuol commandare anche dopo
“ morte, anche per secoli et secoli : quando egli
“ e sotterra. Ma verran sì—verranno le con-
“ fusioni delle guerre e delle pestilenze, verranno
“ le dispense de’ principi, le sottigliezze de i
“ legali, e varie furberie de i possessori di questi
“ beni, e diversi altri accidenti, e specialmente
“ le ordinarie morti, che annuleran le ridicolose

“ disposizioni di chi vuol stendere il suo imperio,
 “ se potesse, sino al fine del mondo.”* All Europe
 has more or less run into error upon this point,
 but in France entails have met with less counte-
 nance than in most other countries. In 1560 the
 French nobility would not permit their extension
 beyond the period of three lives,† but in process
 of time they gained so much ground, and pro-
 duced so much confusion, that the subject was
 brought under consideration by the Chancellor
 D'Aguesseau in 1731, and after taking the advice
 of all the parliaments in the kingdom, he with great
 care and labour drew up an *Ordonnance* which re-
 ceived the royal sanction in 1747, by which they
 were limited to two degrees between the creator
 of the entail and the heir; these degrees besides
 being counted *per capita*, and not *per stirpes*. To
 this *Ordonnance* the following preamble was af-
 fixed:—“ Louis, par la grace de Dieu, roi de
 “ France et Navarre, à tous présens et à venir,
 “ salut:—Dans la résolution que nous avons prise
 “ de faire cesser l'incertitude et la diversité des
 “ jugemens qui se rendent dans les différens tri-
 “ bunaux de notre royaume, quoique sur le fon-
 “ dement des mêmes lois, la matière des dona-
 “ tions entre-vifs et celle des testamens nous ont
 “ paru, par leur importance, devoir être les pre-
 “ miers objets de notre attention, et elles ont fait
 “ le sujet de nos ordonnances des mois de Février

* Difetti della Giurisprudenza, ch. xvii.

† Boulainvilliers, Etat de la France.

“ 1731 et d’Aout 1735. Nous nous sommes pro-
“ posés ensuite d’établir la même uniformité de
“ jurisprudence à l’égard des substitutions fidéi-
“ commissaires, qui peuvent se faire également
“ par l’un et par l’autre genre de disposition;
“ mais la matière des fidéicomis, fort simple
“ dans son origine, est devenue beaucoup plus
“ composée, depuis que l’on a commencé à
“ étendre les substitutions non-seulement à plu-
“ sieurs personnes appelées les unes après les
“ autres, mais à plusieurs degrés ou à une longue
“ suite de générations. Il s’est formé par là
“ comme un nouveau genre de succession, où la
“ volonté de l’homme prenant la place de la loi a
“ donné lieu d’établir aussi un nouvel ordre
“ de jurisprudence, qui a été reçu d’autant
“ plus favorablement qu’on l’a regardé comme
“ tendant à la conservation du patrimoine des
“ familles et à donner aux maisons les plus
“ illustres le moyen d’en soutenir l’éclat; mais
“ le grand nombre de difficultés qui se sont
“ élevées, soit sur l’interprétation de la volonté
“ souvent équivoque du donateur ou du testateur,
“ soit sur la composition de son patrimoine et
“ sur les différentes déductions dont les fidéicom-
“ mis sont susceptibles, soit au sujet du recours
“ subsidiaire des femmes sur les biens grevés de
“ substitutions, a fait naître une infinité de pro-
“ cès qu’on a vu même se renouveler plusieurs
“ fois à chaque ouverture du fidéicomis, en
“ sorte que, par un évènement contraire aux
“ vues de l’auteur de la substitution, il est arrivé

“ que ce qu’il avoit ordonné pour l’avantage de sa
“ famille en a causé quelquefois la ruine. D’un
“ autre côté, la nécessité d’assurer et de favoriser
“ la liberté du commerce ayant exigé de la sa-
“ gesse de la loi qu’elle établit des formalités né-
“ cessaires pour rendre les substitutions pub-
“ liques, la négligence de ceux qui étoient obligés
“ de remplir ces formalités, est devenue une nou-
“ velle source de contestations, où les suffrages
“ des juges ont été suspendus entre la faveur
“ d’un créancier ou d’un acquéreur de bonne foi,
“ et celle d’un substitué qui ne devoit pas être
“ privé des biens substitués par la faute de celui
“ qui étoit chargé de les lui remettre. C’est par
“ toutes ces considérations, qu’après avoir pris les
“ avis des principaux magistrats de nos parlemens
“ et des conseils supérieurs de notre royaume,
“ qui nous ont rendu un compte exact de leurs
“ jurisprudences différentes, nous avons cru que
“ les deux principaux objets de la matière des
“ fidéicommiss demandoient que nous partageas-
“ sions cette loi en deux titres différens. Le pre-
“ mier comprendra tout ce qui concerne les sub-
“ stitutions fidéicommissaires considérées en elles-
“ mêmes, et les droits que peuvent être exercés
“ sur les biens substitués. Le second regardera
“ les obligations imposées à ceux qui sont grevés
“ de substitutions, soit pour leur donner le ca-
“ ractère de publicité qui leur est nécessaire, soit
“ pour assurer la consistance et l’emploi des effets
“ qui en font partie, soit pour l’expédition et le
“ jugement des contestations qui s’élèvent dans

“ une matière si importante. Si la multitude et la
“ subtilité des questions abstraites dont elle est
“ remplie, l’opposition qui règne à cet égard non-
“ seulement entre les opinions des plus célèbres
“ jurisconsultes, mais entre les jugemens des tri-
“ bunaux les plus éclairés, et la nécessité de ré-
“ soudre des doutes où le poids presque égal des
“ raisons qu’on oppose de part et d’autre rend le
“ choix si difficile entre les sentimens contraires,
“ ont retardé plus longtemps que nous ne l’aurions
“ désiré la publication de cette ordonnance, nous
“ espérons que nos peuples en seront dédom-
“ magés par la grande attention que nous avons
“ eue à la mettre dans l’état de perfection dont
“ elle pouvoit être susceptible. Loin de vouloir
“ y donner la moindre atteinte à la liberté de
“ faire des substitutions, nous ne nous sommes
“ proposés que de les rendre plus utiles aux
“ familles ; et notre application à prévenir toutes
“ les interprétations arbitraires par des règles
“ fixes et uniformes, ne servira qu’à faire respec-
“ ter encore plus la volonté des donateurs et des
“ testateurs, en les obligeant seulement à l’expli-
“ quer d’une manière plus expresse. C’est ainsi
“ que nous donnerons à nos sujets une nouvelle
“ preuve du soin que nous prenons de maintenir
“ le bon ordre au-dedans de notre royaume, par
“ l’autorité de nos lois, dans le temps même que
“ nous sommes le plus occupés à le défendre au de-
“ hors par la force de nos armes, dont le principal
“ objet est de procurer le grand bien de la paix à
“ un peuple si digne de notre affection par son

“ attachement pour notre personne, et par le zèle
 “ qu’il fait éclater tous les jours de plus en plus
 “ pour notre service. A ces causes, et autres à
 “ ce nous meuvant, de l’avis de notre conseil
 “ et de notre certaine science, pleine puissance
 “ et autorité royale, nous avons dit, déclaré et
 “ ordonné, disons, déclarons et ordonnons, vou-
 “ lons et nous plait ce qui suit.”*

This reasoning well deserves attention both from
 the capacity and experience of the writer, the pa-
 tient and profound attention he had paid to the
 subject, and its striking coincidence with the senti-
 ments of Lord Stair, confessedly the ablest institu-
 tional writer on the law of Scotland, and who was
 long at the head of the law in that country as
 D’Aguesseau was in France. “ The perpetuities
 “ of estates,” says he, “ where they have been long
 “ have sufficiently manifested their accustomed
 “ inconvenience, and therefore devices have been
 “ found out to render them ineffectual. Only the
 “ *Majoratus* of Spain hath been most reasonable
 “ and stable, that the king nobilitating a person
 “ of merit and fortune, either by the king’s gift
 “ or in his own right, that estate can neither be
 “ alienated or burdened, but remains alimentary
 “ for the preservation of the dignity of that fa-
 “ mily. But these perpetuities in England are
 “ now evacuated by a simulate action of fine and
 “ recovery, and by warrants to bill purchased in
 “ parliament, which pass without much difficulty;

* Œuvres de D’Aguesseau, tom. xii. p. 265. and 476, 8vo.

“ and if they become frequent with us it is likely “ we will find the same remedy.”* This prediction has not yet had, but it is to be hoped will soon have, its full accomplishment. Entails have there become so frequent that they extend over half the country, and the provisions which they contain, generally unite every quality which can make any particular branch of law abominable. They are impolitic, oppressive, and unalterable. Owing their origin to the most discreditable duplicity and selfishness,†—leaving younger children almost always ill provided for—and sometimes carrying the whole estate to very distant male relations, while the whole immediate female descendants of the last possessor are left almost destitute,—they impose checks upon the acquisition and employment of property, which may not have done much injury in rude times, but seriously confine the range and depress the spirit of modern improvement.

The English law of entail is different from both of those which have been now mentioned. It permits entails to be framed in appearance almost as interminable as those of Scotland; but they may, if heirs of entail think proper, be prevented from enduring beyond the period prescribed by the antient law of France. They cannot be made to last irrevocably beyond a life or lives in being, and the minority of the persons who may then

* Stair's Institutes of the Law of Scotland, book ii. tit. iii. sec. lviii.

† Laing's History of Scotland, v. iv. p. 160.

succeed. Whether it would be practicable or expedient to deprive the owner of real property of any part of the powers which he now possesses of limiting and entailing it, is among the most difficult questions which occur in the whole range of English jurisprudence. It ought to be done if it can. It is not fit that every man should have the right of settling his property according to what he conceives the state of his family requires. It produces such an infinity of experiments upon the law, and such endless intricacies of arrangement, that the law becomes absurd and confused by being twisted to so many different purposes. If a man gives away real property absolutely, however absurdly it is done it causes no harm either to the law or the public, but every man who invents a new mode of settling real property does that which is extremely mischievous both as an act and example. The evil which all this produces is aggravated by the numerous and circuitous methods by which these intentions are executed. There are so many methods of limiting the succession to real property and its enjoyment afterwards, by means of *executory devises, springing uses, shifting uses, contingent remainders, resulting trusts, reversionary interests, conditions precedent and subsequent* in restraint of marriage or otherwise, that the machinery which has been constructed becomes unmanageable, and probably not one in a hundred of those settlements, of the nicety and convenience of which conveyancers are so apt to boast, has its provisions faithfully

followed for twenty years after it comes into operation. But whether the owner of real property should be deprived of any part of the power which he now possesses of limiting or entailing it or not, the powers of enjoyment of it, which those should have who are called to the succession, ought surely to a considerable degree to be defined by the legislature. This observation applies particularly to the power of allowing maintenance for children, the power of sale, and the power of appointing new trustees. It may be doubtful also, whether specific legislative forms should not be prescribed to which every person who made a settlement should be obliged to conform. This would prevent conveyances from embracing an entail by verbosity, and relieve Judges from all difficulty respecting the nature of the interests respectively granted. If it were further declared, that no settlement should be effectual unless registered within a certain period from the death of the maker or testator, registration would become essentially necessary; and if absolutely necessary, it would be for consideration whether the different tenants for years, for life, or in tail, might not be let into possession of the estate, without the intervention of those *Trustees*, whose nomination in the instruments of settlement is now conceived to be indispensably requisite. Trusts are a sort of Upas tree, which can scarcely be prevented from overspreading and entangling the law of every country where they have been permitted to take root. Chief Baron Atkyns declared a century ago, that

Trusts “ have perplexed and turmoiled almost “ every estate in England,”* and since that time the evil has gone on regularly increasing, until almost every man acts as a trustee for his neighbour, or his neighbour for him. Let us consider what happens to these trustees after their appointment. Either they do their duty conscientiously or they neglect it. If as most frequently happens they neglect it, either by refusing to act or by too great facility in signing their names and giving their consent to every measure and instrument approved of by the person for whose benefit they are appointed, they can do no good, and often do much harm, either to their own fortune, to the trust, or to both. If on the other hand they act conscientiously, they are usually soon requested to sanction proceedings which are either irregular or injudicious, and by this means lose the countenance and favour of their friends, and that frequently without being able to render them any effectual assistance. Friends then are unfit trustees from the disagreeable alternative under which they are almost certain to be soon placed ; and barristers, conveyancers, and solicitors, are still more unfit, from the manner in which their interest must necessarily interfere with their duty. As one class of professional persons is prevented by a rule of practice from becoming responsible for their clients,† all classes of them ought to be disqualified from acting as trustees by statute. If trustees

* Abuses of Equity, p. 22 and 24.

† Tidd's Practice, p. 230, 4th Ed.

are necessary, public officers ought to be appointed for that express purpose. Their situation would exempt them from any application to be accommodating or unfaithful, and their duty would render acquiescence impracticable. Their intelligence would secure those whose interests they are bound to protect from being ruined by carelessness or ignorance, and being always on the spot and constantly accessible, there would be an incalculable saving to the public in expense, delay, and trouble. But it may be questioned whether by far the greatest part of trustees might not by means of registration be superseded altogether. If the provisions contained in the conveyances of real property were enrolled, all parties interested might know what they were and when they were infringed ; and if it were declared that no vested interest or remainder should be prejudiced by any wrongful act of the tenant for life, or by the union of the tenancy for life with the reversion ; trustees, whether created for the imaginary purpose of making entries and bringing actions as occasion may require—in order to support contingent remainders—or answer any of the ends which they are now made to serve—might almost all of them be dispensed with. Even trusts of personal property might by means of registration be managed somewhat in the same manner ; and conveyancing being brought at least so far back to the plainness of Common Law, the rights and interests of all parties concerned would be more easily understood and defended. There is only one precaution which it would be perhaps necessary to take,

and that is to prevent any alteration in the separation now established between courts of Common Law and Equity.

As it would well become the legislature to deliberate whether some advisable alterations in the forms of creating entails—in fixing and arranging their limitations—and in settling the means of securing the interests of the parties during their continuance, may not be devised; it might easily effect some improvement in the means by which they are destroyed. If they were permitted only for a certain length of time or number of lives, the arrival of the period or full age of the person in whom the entire fee vested, would distinctly point out the limits of their endurance. If on the contrary, it were thought proper to continue the present system, and to permit the introduction of a lengthened series of interests, which the tenant in tail might at a certain time cut off, no person will be found to deny that this might be done by shorter, cheaper, and easier methods than those of *levying a fine and suffering a recovery*, which are now in use. These clumsy, intricate, and expensive processes have been exposed and ridiculed for upwards of a century by every person of capacity who has turned his attention to the subject,* yet they remain to this day a signal monument of the extent to which the private interests of officers of courts of Law and Lawyers triumph over public utility. It is to be hoped the day is not

* Delay of Suits at Law and in Equity. London, 1735, p. 35. Barrington on the Statutes, p. 131 and 132. Blackstone's Com. v. ii. p. 360.

far off, when such preposterous fictions will unanimously be exploded. A deed for the purpose of cutting off an entail, executed by the parties entitled, or any deed which may be executed incompatible with its continuance, would answer every end which fines and recoveries now do, at a twentieth part of the trouble and expense which they occasion. If fines and recoveries of legal estates were abolished, those of equitable estates would necessarily fall with them. Indeed they always were superfluous;* and as the best proof of this fact, they are supplied in some cases,† and superseded in others,‡ where the ceremony, had it been of any utility, would have been as indispensable as in those in which it is now exacted.

5. The last part of the law of real property to which attention shall now be called as capable of amendment, is the means by which real property may be charged for the purpose of raising money or making provisions for wives and children, or any other purpose. With respect to the first of these objects, if registration were established, there seems no reason why the person in possession should not have the power of charging it upon the estate. Registration would make this charge sufficiently effectual, and if so, the usual apparatus of

* 1 Vesey's Rep. 14. 3 Atk. Rep. 815. 5 Ves. Rep. 13. 16 Ves. Rep. 224. 2 Merivale's Rep. 171. 2 Jacob and Walker's Rep. 1. 206. 3 Co. Lit. 326, b.

† 3 Vesey's Rep. 69.

‡ 39 and 40 Geo. 3. chap. 56.

terms for 500 and 1000 years, would become superfluous. Money raised by mortgage, or made answerable for any demand by the judgment of a court of justice, might in all cases be made personal property, and secured by registration in the same manner, and then *Statutes Merchant*, *Statutes Staple*, *Elegit*, and *Recognizance* might all be swept away together. At all events, these four methods of fulfilling the same object cannot all be requisite. The cause to which they owed their origin has now ceased, and its effects ought to cease with it. There might also be legislative forms for mortgage deeds, and enlarged powers might be given to mortgagees for assigning them, and for altering the rate of interest, terms or place of payment of interest, or any other conditions of the security. It is well known that the length of recitals contained in mortgage deeds, and the expense of getting fresh deeds executed is so great as frequently to preclude the mortgagor from availing himself of the fall in the rate of interest, and that in small sums it actually swallows up a considerable portion of the principal. Amendments in the law, even in matters of this abstruse and apparently uninteresting nature, would afford sensible relief to many families, whom the present system has straitened or reduced to indigence.

In reply to the preceding observations on the present state of the law of real property in England, it has been said that it answers practical purposes extremely well, and that neither the

titles to estates, nor entails of them created by will or settlement are productive of any great proportion of the suits which are brought into courts of justice. I believe an examination of the fact will neither warrant these assumptions, nor the inference intended to be deduced from them. The farther the investigation is carried, the more manifestly it will appear, that few titles to estates which are sold are either clear or unclouded, and that the provisions of scarcely any marriage or testamentary settlement are carried strictly into execution, and when they are scarcely ever without the authority of a court of Equity. The suits which in consequence of this state of things are brought into courts of justice are far from infrequent, and though they were unknown, it would not follow that difficulties about titles did not exist. The disputes out of court which take place among lawyers on behalf of their respective clients relating to titles and family settlements, to some class of whom recourse is almost invariably had whenever the transference of real property takes place, bring as much gain to them, and create as much delay and anxiety to the parties, as law-suits ought to do, and there is reason to suspect that the true reason why they do not more frequently end in law-suits is, that the parties are driven to a compromise, through fear of the intolerable addition of vexation and expenditure which those law-suits would occasion. No blame is here intended to be cast upon any individual. It is difficult for any professional person to act otherwise

than custom or the system of the profession to which they belong compels them to do. Still the system itself may be grossly erroneous and defective, and that this is the case the private acknowledgments of practitioners, the universal complaints of private parties, the declaration of the judges, and the catalogue of annual private acts of Parliament which are made to cut the knots which lawyers and conveyancers are unable to untie,* seem to afford superabundant evidence. But whatever the opinion, or wishes of the public may be, how or whence can they obtain relief? Conveyancing is vastly too complicated for any members of either House except lawyers to touch, and none of them appear disposed to approach it. Were the government to call in the temporary or permanent assistance of two or three able conveyancers, and to make it as much their interest to devise means for shortening deeds and instruments as it is that of others to extend them, and to simplify conveyances instead of involving and diversifying them, it would be no less delightful than surprising to witness the improvement, clearness, and compactness of which both deeds and conveyances would then be found susceptible. Few undertakings could be named, of which the successful prosecution would diffuse greater satisfaction throughout every corner of the country.

* Blackstone's Com. v. ii. p. 344.

CHAPTER III.

ON THE MEANS BY WHICH THE GENERAL IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE MAY MOST EFFECTUALLY BE FACILITATED.

THE two chief ends of every government is to protect its subjects against invasion from without and injustice from within. For the attainment of the one it must depend upon its fleets and armies. The other is accomplished by means of good laws impartially and regularly executed. Though the first be in many respects only subsidiary to the second, it has invariably received a larger portion of attention. Those whose powers of mind and body have been exhausted in ascertaining the rights and promoting the security of their fellow citizens on the judgment seat, have received but a small portion of that general and enthusiastic admiration, which has been so lavishly bestowed upon those by whom their rights have been defended in the field. The delight which the mass of mankind take in narratives of war and battle, and the interest they feel in the fortunes of those who contribute to urge the tide of conquest or swell the roar of victory, has hitherto far exceeded that which has ever been afforded by the gentle and unostentatious triumphs gained by law and equity, over the force of the powerful and stratagems of the unjust. But if a period should arrive, when the sword shall become subservient to the balance, and the qualification of the government to promote the moral and social happiness of the

people shall be deemed the best test of its excellence, and the extent of that happiness the decisive mark of national superiority, then the state of the law and the character of its administration will in every country assume that paramount importance which of right belongs to them, and both among statesmen and throughout the community, become the theme of more frequent and deep deliberation than they have ever yet been. “I look upon the administration of justice,” says Lord Hardwicke, “as the principal and essential part of all government. The people know and judge of it by nothing else. The effects of this are felt every day by the meanest, in the business and affairs of common life. Statesmen indeed have their attention called off to more extensive political views : they look abroad into foreign countries, and consider your remote interests and connections with other nations. But of what utility are those views, great as they are, unless they be referred back to your domestic peace and good order ? The chief office of government is to us the regular course of law and justice.”* This is so true, that the freedom of any government, and greatness of its people, cannot be so correctly estimated by any single circumstance as by the regard which has been entertained in it for the enforcement of justice, and the rank which its ministers have held in the estimation of the public. An enlightened and incorrupt dispensation of justice is as unfit for a despotic or tyrannical government, as a despotic or tyrannical go-

* Hansard's Parliamentary History, v. xiv. p. 20.

vernment is incompatible with it. In all the relations in which it can be viewed, in its immediate, remote, and collateral consequences, no state can display too much anxiety for the acquisition, continuance, and improvement of this invaluable blessing. There are three things by which the administration of justice is affected—the details connected with its administration—the qualifications of the persons by whom that administration is conducted—and the character of the laws themselves which are administered. All of these act and re-act so powerfully upon one another, that when any practical measure is in contemplation, they ought always to be viewed in conjunction, although, for the sake of order and perspicuity, it may here be more expedient to treat them separately.

SECTION I.

Of the Details connected with its Administration.

UNDER these terms, all those arrangements are meant to be included which are preparatory or auxiliary to the administration of justice itself. No apprehension however need be entertained of any attempt being here made to trace the outline of an entire judicial system. To develop imaginary schemes of excellence and perfection, and deduce the admirable consequences which necessarily follow from abstract general principles, cannot fail to be agreeable, and may sometimes

prove instructive. They are very favoured individuals who are qualified to tread within such a circle. The object of the following observations is of a more confined and practical nature. It is merely to select a few important particulars, which seem entitled to attention in every good system of jurisprudence, and which, though sufficiently obvious, have oftentimes been too much neglected.

1. The first and least important of these which shall be mentioned, is the convenience of the courts in which justice is administered. By those persons who pretend to look only at essentials, this topic may be deemed more trifling than it perhaps really is. That the mere form or appearance of the place where justice is dispensed has any marked influence upon the dispensation of justice itself, is not meant to be maintained. Still less is it insinuated that any anxiety should be shewn to render courts of justice objects of architectural decoration. At the same time, as all mankind are affected by external circumstances, it seems fit, even in point of shew, that they should present an appearance of decent stateliness, corresponding to the wealth and consequence of the country for whose service they have been erected. It is of much greater consequence that they should be placed in a convenient situation, be of convenient construction, and of sufficient size for the accommodation of practitioners, parties, and a reasonable portion of the public. In most of these respects the courts of justice in England are almost all exceedingly defective.

They are planned with little skill, and almost all of them are so small as to deny to those who are obliged to attend them that moderate accommodation which they have a right to expect. Easy egress and regress on such occasions, and facility of intercourse between parties where communication is frequently required, afford great relief to the judge and practitioners, and enhance both the quantity and quality of the business which has been transacted. The propriety of all subordinate arrangements, the certainty of the times at which the judges sit, the regularity of the hours at which they take and leave their seats on the bench, and the undeviating order in which business is carried on, all contribute to the same end. Whatever prevents tumult and irregularity, materially tends to promote the expeditious, decorous, and satisfactory administration of justice; and in several of these points our judicial system is capable of decided amelioration.

2. As courts of justice ought themselves to be convenient, it is of far greater moment that the proceedings in them should be public. As publicity is one of the most easy, obvious, and effectual, of all securities for the pure administration of justice, it is surprising it should not have been more universally established. There can be no motives for secrecy but those which none are willing to avow. In Lord Hardwicke's manuscript notes of his own speech, on moving the address of the House of Lords to George III. on his Majesty's proposal to make the judges inde-

pendent of the demise of the crown, the following appear to be the heads upon which he intended principally to enlarge:—"In the best policed countries abroad, judges do not give the reasons of their judgments in public and openly—some persons prefer the reputation of their understanding to that of their conscience—would be ashamed to talk nonsense to the world in support of a judgment that they would suffer themselves privately."* Even at this day there are many countries in Europe, where the practice is in direct contradiction to every one of these opinions. In Spain, Portugal, Austria, Prussia, Italy, and it is believed also in Bavaria, Denmark, Sweden, and Russia, many of the courts are closed against the public, and no reasons are assigned for the judgments which have been delivered. However singular it may appear in this country that any doubt should exist respecting the manifold mischiefs of such a custom, a keen controversy is at this moment going on in the principal states of Germany on the subject. To hear causes in private, and to decide them in private, with reasons, and still more without them, cannot from the constitution of human nature be favourable to the able and upright administration of justice. The greatest stimulus to exertion and check to malversation is removed, and every possible facility to misconduct is afforded. In no country are proceedings in courts of justice more open to public

* Hansard's Parliamentary History, v. xv. p. 1012.

inspection than in England. They are accessible at all hours and upon all occasions. There are scarcely any exceptions to this rule, except when petitions are heard at the Rolls by consent; where causes are heard before the judges in Equity when they happen to be in their own houses; or where all parties concerned desire when they are brought on in court, that the hearing should be private. The first of these is in fact no exception at all. The petitions heard before the Master of the Rolls might just as well be public as private, and it would be perhaps better if they were. About the exclusion of the public in the other instances there may be greater doubt. Wherever a judge sits to administer justice, whether in the court where he presides or in his own house, the place which he occupies immediately becomes a judicial tribunal, to which the public ought to have unrestrained admission. What ought to be done where all the parties desire the hearing to be private, presents more serious difficulties, especially as it happens in most of such causes that publicity would be painful to the feelings of most of the parties, and, to say the least of it, of no service to the morals of the country. At the same time the notoriety of judicial proceedings is of such paramount consideration, that it would perhaps be desirable that it should be established without limitation or exception. If any matter is discussed in courts of justice which ought not to be allowed to meet the public eye, the judge might be allowed to use every precaution to prevent them

from being widely disseminated; but the court itself, in which the proceedings take place, ought to be perpetually open. Not only does it seem desirable that the proceedings of courts of justice should be public, and that the judges should publicly declare the reasons of their judgments, but every thing connected with the state of the business of courts of justice ought, as far as possible, to be made public also. For this purpose it seems fit that complete rolls of all causes which are in dependence before the court or any of its inferior officers, either originally or upon appeal, should be regularly prepared and posted up in one of the most conspicuous parts of the court. It is not believed that this has been at all attempted abroad, and not half the use of which it is susceptible has hitherto been made of it in England. There is however scarcely any amendment in legal proceedings which would occasion so little trouble and expense, and would be so beneficial both to suitors and the public. It would shew, at one glance, the nature and amount of the arrears, the quantity of business done, and the regularity with which it was transacted. Indeed every proposal which makes the administration of justice, and the details connected with it, better known, must almost of necessity promote its improvement. It is a principle to which there can scarcely be any restriction with respect to time, place, or subject. Its effect is similar to that which the light of the sun produces upon the surface of the earth which we inhabit. It dispels what is noxious, detects

what is irregular, defective, or imperfect, and sheds an animating, purifying, and correcting influence wherever it extends.

3. Another of the circumstances most favourable to the promotion of justice is, that simplicity should be studied in every part of the system of judicature by which it is administered. There should be as few degrees of courts and judges, and as few varieties of jurisdiction, as possible. This is not only a theoretical advantage, but productive of incalculable practical benefit. The less intricate the judicature of any country is, the more clearly it is understood by its subjects, and with the more readiness and certainty do they know where to go when they are injured. There is scarcely any law in Europe which may not in this respect be materially amended. The Roman Catholic religion and the feudal system were both favourable to every sort of intricacy and anomaly. The first withdrew the cognizance of ecclesiastical matters from those to whom it belonged in all other cases, and the second tended to allow every chief to dispense justice in his own way within his own territory. The inconvenience resulting from this unnatural and excessive subdivision of jurisdictions is still felt in almost every country in Europe, and no where more sensibly than in England. We have the courts of Common Law and Equity, the court of the Privy Council, the court of Admiralty, the Ecclesiastical courts, the court of Great Sessions in Wales, the courts of the three counties of Chester, Lancaster, and Durham, the

Stannary courts of Cornwall, the courts of the Recorders of London, Bristol, and other places, the courts of Quarter-Sessions in each of the fifty-two counties of which the country is composed, the Hundred courts, Courts-Baron, and the Insolvent Debtors' court, and no less than 416 courts of Conscience established in different places for the recovery of small debts. The division between the ecclesiastical and secular jurisdiction is unnecessary altogether, and a large proportion of these local jurisdictions might be also superseded. To attempt to alter or remodel any of the chief departments of judicature might occasion unforeseen difficulty and inconvenience; but of the practicability and expedience of suppressing many of the subordinate divisions there can scarcely be a question. The whole of the local jurisdictions ought perhaps to be made to give place to a more comprehensive system. As an instance of the hardship which results from the intangled jurisdiction of the higher courts, take that of a will of real and personal estate. The Ecclesiastical courts have alone power to declare what is or is not a good will of personal estate, and we shall suppose them to declare it to be good accordingly. If the same will should be discussed in courts of Equity with regard to the real estate, these courts may entertain doubts which affect its validity, not only as to the real but the personal estate also, and may send it to be tried in one of the courts of Common Law, by which alone wills of real estate can in strictness be tried. At Common

Law a will may then be declared bad in respect of the real estate, which in the Ecclesiastical courts had been found good with respect to the personal estate; or if the parties are willing to abide by the decision of the court of Equity without sending it to Common Law, that court will proceed to prove it with respect to the real estate in a manner different from that which is recognized by either. In this case neither consistency nor convenience is discernible in the proceedings which may or must be instituted in these different courts, but an unfortunate tendency to retard and enhance the expense of the administration of justice, which it is the end of all of them to promote.

So far from diminishing the number of jurisdictions, it is now proposed in this country to increase their number. This will be the effect of the County Court Bill which was rejected last year, and has again been laid before parliament for its adoption in the course of the present session. The necessity of affording to the subjects some such relief as that which this bill proposes, must distinctly be admitted. An extensive and pressing evil exists, and it is the duty of the legislature to endeavour to find a remedy. A plan not very dissimilar to that which has now been introduced, was one of the proposals which Shepherd laid before the country in 1657. It was one of his recommendations "to set up a
" court of judicature in every county to be kept
" by some of the justices of the peace, with a law-
" yer for some special matters, as probate of wills,

“ poor men’s causes, matters of equity under
“ £100, tithe and legacies of that value.”* And
in furtherance of the same object he superadds,
“ That the county courts, hundred courts, and
“ courts-baron, be regulated for the fees and pro-
“ ceedings therein by the justices of the peace in
“ the county, and able judges settled and kept in
“ them, and that all the small causes be kept and
“ tried there, and that men have no power by
“ pleas and removes to take the small causes out
“ of these courts as now is used. That a lawyer
“ sit there to be paid by him that hath the profits
“ of the court; and the fees and proceedings to
“ be printed.”† Whether the plan here specified
or that contained in the County Court Bill would
afford a suitable remedy for the grievance, and add
one more to the already overcharged list of juris-
dictions, it remains for those who are qualified to
determine. To add without deducting appears in
such a case a disadvantage. It then comes to be
considered what effect the institution of a new
jurisdiction is likely to create upon the courts of
Quarter-Sessions and Common Law courts in
Westminster Hall, which are the two jurisdictions
most likely to be affected by it. It may perhaps
affect both, but if it succeeds, one or other of
them must be affected unavoidably. In this re-
spect it must be regarded as an experiment of so
bold a character as to demand all the consideration
which the legislature can bestow upon it. If it

* Shepherd’s England’s Balme, 1657, 12mo. p. 62. † Id. p. 63.

succeeds, it is scarcely possible that it should not be extended a great deal farther; and if it should, it may be worth while to reflect what the effect upon the courts of Quarter-Sessions and Westminster Hall would most likely be. If it affected the local magistracy merely as judges, the country would have no reason to entertain any apprehensions with regard to the change. Notwithstanding the eulogies, which individuals of the highest character have passed upon the unpaid magistracy, if they are considered merely as judicial characters, it is impossible for any impartial person to treat them with extraordinary reverence. Many country gentlemen who act as magistrates are no doubt possessed of considerable legal acquirements and great experience in country affairs; but the course of things and present intricacy of the law renders it impossible to suppose that regularly educated and permanent stipendiary magistrates would not administer justice with greater ability and impartiality. Those qualities of mind which make a good judge are neither acquired easily nor rapidly; and in the present state of law and society, those whose sole business it is to dispense justice, will succeed better than those who make it only a subordinate study and concern. Considered merely with a view to the administration of justice therefore, it seems clear that it would be dispensed better by regular and stipendiary judges than by the gratuitous services of country gentlemen. But there are other aspects in which the subject well deserves to be

considered. Those country gentlemen who act as magistrates, form an important link in the chain of society, and various functions are assigned to them in the theory and practice of our constitution, which probably would be imperfectly discharged if their judicial character and consequence sustained a total alteration. The duties they have to fulfil at Quarter-Sessions keep them resident in the country; the attention they are obliged to pay to the state and change of the laws, keeps alive the interest they feel in public measures; and that practice in speaking and deliberation which this situation superinduces, qualifies almost every person of considerable property, for performing his part in public when it becomes necessary, which is one of the most striking characteristics of the gentlemen of this country. Whether the state might not upon the whole be more injured by their depression than it would be benefited by the probable improvement in the administration of justice, then becomes the question, and it is one which it seems not very easy to settle. Let us now look at the effects this institution might have upon the courts of Common Law at Westminster Hall. As the Common Law courts rose upon the ruin of the County and Hundred courts, this new jurisdiction would most probably rise upon theirs. Whether this second change would be beneficial, is somewhat perplexing likewise. Unless the judges who preside in the projected County courts were men of great judicial endowments, who had no other duties to

discharge, it would almost certainly prove prejudicial. To give £600 or £800 a year to a certain number of barristers of no decided capacity or acquirements, to make a circuit for a limited time through different parts of the country, seems to be one of the least feasible plans imaginable. Too many of such half measures have been tried in this country already, and for any really valuable purpose they have invariably proved equally expensive and inefficient. If, on the other hand, the new judges are raised a step higher in salary and character, than has now been supposed, they would be more likely than in the other case to interfere with their brethren in Westminster Hall, while there might be considerable doubt whether the business before them would eventually be dispatched more cheaply or with greater satisfaction. The courts of law being now few, assembled in one place, the judges being possessed of the greatest acquirements that can be found, and the communication between town and country being so much facilitated, all these circumstances strongly militate against the transference to any other quarter of the business which has for so many centuries been there conducted. It is not attempted to anticipate what arrangement it would on this occasion be wisest to adopt. Whether any division of the jurisdiction which is intended to be given to the County courts might be made between the Circuit courts, Quarter-Sessions, and courts of Conscience; or whether the proposed County courts should supersede some of the

courts now existing, requires patient and close investigation. All that is here contended for is, that when we have already so many jurisdictions, jostling and crossing one another, to add a new element of confusion without any of the pre-existing ones being withdrawn, seems to be running counter to one of the chief rules by which all judicial reformation should be governed.

If it be inexpedient to have many jurisdictions, it is still more objectionable to have many gradations of courts in each jurisdiction. The systems of judicature established in most countries of Europe abound too much in a succession of courts, rising one above another, from the subordinate court of the district to the court of last resort established in the capital. This principle was always bad, and is now more indefensible than ever. Of all the unwelcome prospects that can open on an anxious litigant, a tedious vista of appeals is certainly the most dejecting. It gives a decided advantage to the rich man over the poor, and independently of the expense it entails, it may be doubted whether it is the best way of having the merits of a cause impartially and dispassionately examined. It is better that a system of judicature should ensure an able and complete judgment at first, than give the suitor an opportunity of ten revisions of it afterwards. There never could be any reasons for more than three ranks of courts, and two will generally be found sufficient. In England few of the causes which arise in Common Law or in Equity are discussed in

more than two courts, that in which they are originally brought, and that to which they are carried by appeal afterwards. But though this is the case in practice, yet both in Equity and at Common Law these discussions may in most instances be doubled. A cause in Equity may now be twice tried before the Master of the Rolls or Vice Chancellor, and twice before the Chancellor, before it is decided for the fifth time in the court of ultimate appeal. At Common Law a cause may be brought by appeal from the Quarter Sessions to the courts of King's Bench or Common Pleas, each of which courts may desire it to be again spoken to after it has been once regularly debated. If brought to the Common Pleas it may be carried, as has been already mentioned, to the King's Bench, and if to the King's Bench from that to the Exchequer Chamber; and either from the King's Bench or Exchequer Chamber to the House of Lords. This appears to be carried in France to an extreme which must be productive of considerable oppression. In that kingdom there are three degrees of courts, those of the first, second, and third instance. When a cause has been heard by those of the first and second instance, and comes by appeal to that of the third or *Cour de Cassation*, it is not at once determined there, but sent down to another court of the same degree with that from which it has come, in order that it may there undergo revision. Though no definitive judgment however is pronounced by the *Cour de Cassation*, it is impossible

that it should not in it be submitted to some degree of discussion. If the judgment formerly given should be confirmed in the court to which it is sent down, and again appealed to the *Cour de Cassation*, it may be sent down a third time to a third court in the same manner, and it is only in case of a third decision contrary to the opinion of the judges of the *Cour de Cassation* that the question comes there to be regularly debated. This court then assembles in an *audience solennelle* under the presidency of the keeper of the seals, and pronounces a final judgment. In what has now been mentioned respecting the judicial system of France, recourse has necessarily been had to private information; for it is singular enough, that whatever anxiety may have been shown to disseminate a knowledge of the French law among the people, no written book has yet given any systematic account of its judicature, though the system of judicature forms one of those parts of the law in which the public is so materially interested. Supposing however, what has been stated to be correct, the result will be, that every question in law or Equity may be discussed five several times in England and no less than six in France. One can hardly conceive any process to be more harassing and exhausting. Under no circumstances can so much revision be advisable. It is no reply to the objection which has been urged against it, that a plaintiff or defendant will seldom be carried through all the stages of appeal

which by the letter of the law are practicable. Though not used, why should it be possible to use them? This protracted war of argument is more likely to convert judges into critics of each other's reasoning, and partizans of the various opinions which are maintained before them, than ingenuous inquirers after truth, or calm and unbiassed directors of the streams of Law and Equity which it is their duty to dispense.

4. There is one other point which so greatly affects the system of judicature, that it ought not to pass wholly unnoticed. It is, whether all the tribunals which it recognizes should be permanent, or whether some, and which of them, and to what degree, ought not to be rendered ambulatory. There are decided advantages and disadvantages to be met with either way. There is no state in Europe where the judges of the supreme courts of law make annual circuits round the whole country except in the British empire, nor is there any other method by which the whole body of the subjects are enabled to avail themselves of so much ability on the bench and at the bar, with so much convenience, and at so little comparative expence. On the other hand, if courts were to continue ambulatory too long, the life led would become so disagreeable, that men of the highest reputation would cease to preside in them or practise before them; and even though they did, their attention would become so dissipated by change of place, that the faculties of the mind could not be brought to bear upon any subject with their usual energy.

Besides all this, if there is a press of business and the time of court at any one place is limited, the bench and the bar are apt to become impatient, and to dispatch business with much greater rapidity than the difficulty of causes will warrant, and by contrivances to which they ought never to be permitted to resort. This is said very often now to happen, and it is a sort of mal-administration of justice which cannot be guarded against with too much vigilance. Against this last defect, permanent provincial courts are more likely to be free. But besides the disadvantage of forming an additional step in the ascending scale of appellate jurisdictions, there is a strong disposition every where prevailing, to be dissatisfied with what is nominally of a secondary order, and the indolence or contraction of mind which a provincial residence frequently induces, is apt to make the value of the judgments of these courts secondary in reality as well as in appearance. It may therefore be desirable to postpone the establishment of these courts as long as it can, and to provide a sufficient supply of judges belonging to the supreme Courts, deliberately to dispose of all the causes which are set down before them, within a period not exceeding the six weeks during which the longest circuit is supposed to last.

SECTION II.

Of the Judges and Practitioners by whom Justice is administered.

Every country must select its judges, whatever their moral or intellectual endowments may be, from among the men who are furnished by the passing day among its own subjects. There is no doubt great difficulty in selecting them, as well from the union of qualities required, as from the intricacy of the subjects on which they are employed. This has not escaped the sagacity of Muratori, who has observed “*Secondaria-mente, all’ oscurita delle materie si aggiunge poi la diversa dispozion delle teste degli uomini, che maneggiano le bilance della Giustizia. In alcuni abbonda l’ingegno, ma poco il giudizio; in altri la scienza e lieve ma vigoroso il raziocinio : al contrario d’altri, che intisichiscono su i libri, e hanno gran copia di leggi e paragrafi pronti, ma non sanno raziocinare.*”* Yet there are no public officers in the state whose attainments are of more general concernment. They ought if possible to be men of general learning and capacity, to which it would further be desirable to superadd the advantages of travel and communication with learned men, without which capacity can never be improved to the utmost. These advantages

* Difetti della Giurisprudenza, p. 43.

will not of themselves make a distinguished judge, but it has seldom happened that a judge has attained a lofty and durable reputation without them. No man is so likely to contract prejudices or narrow views both of law and government, as he who has never stepped beyond the limits of his own country, or is unacquainted with all pursuits but those which belong to his own profession. The law is and ever must be a laborious, and consequently to most men rather an exclusive profession; but it is scarcely possible to mention a single judge whose name is held in lasting remembrance, who has not had more than mere case-law to recommend him. Lord Bacon, Coke, Bulstrode Whitlocke,* Lord Hale, Serjeant Maynard, Selden, Lord Somers, Lord Talbot, Lord Hardwicke, Blackstone, Lord Mansfield, and Lord Thurlow, who are among those who have done most honour to the law of England, have been remarkable for their love of general as well as of legal learning. Lord Somers, in particular, is said to have expressed his opinion in the strongest manner of the utility of supplying the bench with sound constitutional lawyers; and of Lord Hale, who taken altogether is perhaps the most eminent man who ever adorned the legal profession in this or any other country, we are informed by his biographer that "It will seem " scarce credible that a man so much employed

* See his speech on installing the Chief Baron of Exchequer. *Lives of the Chancellors*, v. ii. 64.

“ and of so severe a temper of mind, could find
“ leisure to read, observe, and write so much of
“ these subjects as he did. He called them his
“ diversions; for he often said, when he was
“ weary with the study of the law or divinity, he
“ used to recreate himself with philosophy or the
“ mathematics. To these he added great skill
“ in physic, anatomy, and surgery. And he used
“ to say that no man could be absolutely a mas-
“ ter in any profession without having some skill
“ in other sciences. For besides the satisfaction
“ he had in the knowledge of these things, he
“ made use of them often in his employments.”*

He ought to make use of them in his employments, and if he has them not to use, these employments will go on the worse without them. No judge can safely be behind the times he lives in. An acquaintance with cases and a knowledge of minute points of practice can scarcely be rated too highly. They are always of evident, and frequently of decisive utility. Yet after all, they cannot be deemed the greatest qualifications of a judicial character. A judge who devotes himself for a long course of years to the mere mechanical part of the law, without studying it as a science, or looking at the extent to which the system he is administering fulfils the ends of justice, becomes incapable of looking at the subject in one of its most interesting and useful points of view. A distinct perception of the grand rules of Law or

* Burnet's Life of Sir Matthew Hale, p. 25.

Equity is by no means so easily acquired as is usually imagined. A maxim may easily be quoted, or a leading doctrine referred to by a wavering mind striving to escape from a difficulty, but a thorough command of such a body of general principles as will satisfactorily solve the mass of cases which occur, without suffering one of them to do violence to another, is what few judges have attained unto. A correct and comprehensive knowledge of the main principles of law has scarcely ever been combined in the same individual with an extraordinary familiarity with all the intricacies of practice. In the present state of the law of England it is impossible, and there is no reason why the fact should either be concealed or evaded. The more both of them can be acquired, so much the more perfect does the judicial character become, but if an election must be made that which is more necessary ought to be preferred to that which is less. In a subordinate judge a knowledge of practice may wisely be made his chief recommendation, but the higher he is elevated in rank, the more indispensable is it that he should have an enlarged view of human knowledge and affairs, and above all a firm grasp of the leading rules of natural rectitude and justice.

This, among others, is an unanswerable reason why judges should be elevated to the bench before they be too aged. The mind of a lawyer soon becomes warped, unless great care is taken to prevent it. The habit of arguing on every side of a question cannot fail to have an unfavourable ef-

fect on the understanding ; the partialities he acquires for doctrines for which he has accidentally been led to contend at the bar, may sometimes be traced through every period of his subsequent judicial life ; and what is still more melancholy he is but too apt to give into practices, of the discredit of which he is not sufficiently sensible at the time, and cannot with decency express a due degree of reprobation afterwards. If an advocate remains at the bar until he has sounded all the depths of practice, he should never be taken from it. He has lost more than he has gained, and more than by any pains or application he can recover afterwards. Whether much practice at the bar be the best preparation for a judge is still a controverted question. Many of those who fill the highest offices in the law in the different states in Europe have never practised as barristers at all. Most of the judicial officers in France in former times practised extremely little. The mistaken partiality and preference which the French have always shown to military rather than judicial merit, has hitherto induced them to withhold their due portion of renown from a class of men of the most distinguished worth, capacity, and patriotism, who have ever risen up among them. In Germany also the law faculties in the universities, who were mostly if not altogether composed of professors who had never practised, were until 1815 the judicial tribunals to whom questions of law were always referred in the last resort. The law faculty of Saxony in the univer-

sity of Leipsic enjoys that dignity to the present day.

Independently of the unsuitable habits and qualities which a judge is apt to contract if he has practised too long before he has been withdrawn from the bar, the laborious duties of his office require that he should be promoted while his faculties of mind and body remain in undiminished vigour. How long that may continue in any individual instance, it seems impossible to anticipate. There can be no doubt that as long as the body is able to sustain the mind, and the mind itself suffers no decay, every accession of experience enhances the qualification of a judge for the administration of justice. The mind of one is as unbroken at 70, as that of another at 40 or 50, and an abler judgment cannot easily be pointed out either in respect of reasoning or expression, than that which was delivered by Baron Wood in the Exchequer in 1822, when he was on the brink of fourscore.* This and other instances, among whom the present Chancellor holds a conspicuous place, seems to me to prove in the most conclusive manner, that no period of life ought to be fixed, at which a judge ought to be obliged to abdicate his situation. It will be less invidious and more wise to allow every individual case to rest upon its own merits, as an unbending general rule would have deprived the country of the services of some of its judicial officers when they had in no respect

* Price's Reports, vol. xi. p. 270.

diminished either in value or amount. These, however, are exceptions to the ordinary course of nature, which undoubtedly points out that judges ought to be promoted early. If it is urged that it is not till late that they have amassed a sufficient stock of legal knowledge, it casts the heaviest imputation on the whole legal system. It cannot be denied that in this respect the state of the law is as unfortunate for its practitioners as it is for the country. They are in a more depressing condition than those who devote themselves to any other liberal pursuit. Divines, physicians, scholars, poets, painters, statesmen, soldiers, and diplomats, may all attain a full and correct knowledge of their profession while the body has scarcely passed its prime, and the mind is only advancing to its greatest vigour. With the most persevering application it is almost impossible such good fortune can befall an English lawyer. A practitioner who wishes to acquire any thing beyond an acquaintance with the technical routine of his profession, is loaded with masses of print and manuscript that would oppress a Jesuit or a Benedictine. On however he is obliged to toil through precedents and dicta, anxiously looking for some friendly principle to guide him through their mazes, until it too often happens that all strength of body and every thing like real strength of mind sinks under the exhausting labour. If by reason of extraordinary force of constitution he can struggle forward, at the mature age of 40 he finds himself second or third counsel in a cause, and still deficient in that ready recollection of

minute questions in Law or Equity which is expected of him. At 50 he becomes a leader, and when on the brink of threescore, he glides into a mastership in Chancery, or is elevated to a seat on the Bench, where some have been seen to remain till they could scarcely totter up to it without assistance. The consequence is, as may be seen by the greater part of the appointments which have been made within the last 10 or 20 years, many of those who have been promoted have either sunk the office, or they have sunk under it. If the retiring pensions of the judges were granted absolutely after 15 years' service, and not made optional as they are by 39 Geo. 3. c. 110, this would never happen. Younger men are now more required as judges than they have ever been before. Their duties are more burdensome as well as difficult, and corresponding strength and activity should be prepared to meet them. A less extensive fund of merely practical knowledge should be required, and a moderate degree of experience would be found to supply that which is indispensably necessary. Provided therefore those whom it is intended to make judges, give proofs of a judicial turn of mind, and possess a solid acquaintance with the general principles of law and the doctrines of that particular department in which they are called upon to preside, no trifling objections ought to retard their elevation. Of the best and rarest gifts they are already in possession, and diligence and practice will soon supply them with those in which they are defective.

The last and greatest quality of a judge, and

that which adds the key-stone to all the rest, is his integrity. In England the incorruptibility of the judges is so universally acknowledged that in the midst of all the obloquy which public men in every free government must be content to suffer, their personal purity has never yet been called in question. There is great reason to believe that the judges of other countries, especially those of the highest order, have by no means been so universally guilty of venality as is commonly imagined. It is difficult to conceive that magistrates, so powerful and independent as the Justizas of Spain in the days of its glory, would have stooped to acts of personal corruption. Whatever inferior judges may have done in France, there is every reason to be satisfied that the De Thous, the L'Hôpitals, the Ségurs, the Molés, the D'Aguessaus, the Lamoignons, and other high officers who adorned the court of France during the 17th and 18th centuries, preserved their hands as pure as any persons of the same rank among ourselves at the present day. "Avouons le néanmoins," says D'Aguesseau in one of those beautiful discourses he delivered to the parliament at Paris, and which every judge and advocate may read with profit, "et disons à la gloire de la magistrature, que ja-
" mais la justice n'a eu la satisfaction de voir dans
" ses ministres tant de droiture et tant d'intégrité.
" Des mains pures et innocentes offrent une culte
" agréable à ses yeux. La probité est devenue si
" commune, qu'elle n'est plus regardée comme une
" distinction. On rougiroit de n'être point ver-

“ tueux; on ne se glorifie point de l'être: et le
 “ vice non-seulement condamné mais inconnu
 “ dans cette auguste compagnie, est réduit à se
 “ cacher dans des tribunaux obscurs, éloignés de
 “ la lumière du sénat.”* In the country of Grotius,
 Bynkershoeck, Voet, Vinnius, and so many other
 distinguished international lawyers and civilians,
 bribery was as little likely to prevail; and Meyer,
 upon whose candour and accuracy there is every
 reason to rely, has expressly denied its existence.
 In that part of his valuable work which relates to
 the institutions of his native country, he expresses
 himself in the following terms, “ Si nous avons dû
 “ tracer une peinture peu flatteuse des tribunaux
 “ des Pays Bas et surtout de la Hollande, c'est
 “ dans l'indispensable nécessité d'exposer les in-
 “ stitutions comme elles étoient: heureusement
 “ que dans l'application, l'intégrité des magistrats,
 “ et surtout leur incorruptibilité, non-seulement
 “ tempérait les effets qu'on aurait pu craindre de
 “ ces institutions, mais que telle était l'austérité
 “ et la puissance des mœurs, que dans aucun pays
 “ de l'Europe peut-être la justice n'étoit adminis-
 “ trée avec plus d'équité.”† These passages will
 be read with satisfaction by all who love to hear
 of whatever has conduced to the past, or may be
 made to contribute to the future welfare of their
 species. Among ourselves the personal purity
 of the judges has for the last century and a half

* Œuvres de D'Aguesseau, vol. i. p. 83. 8vo. Ed. 4me Mercuriale.

† Esprit, Origine, et Progrès des Institutions Judiciaires des principaux pays de l'Europe, tom. iv. p. 189.

shone so conspicuous that we are apt to forget the lateness of the period at which it arose to enhance the brightness of our national glory. In 1291, in the time of Edward I. all the judges were fined but two, and many of them in very heavy sums. “From this time,” it is said, “the judges were obliged to swear at the entrance into their offices, that they would take no money or present of any kind, except a breakfast, from such persons as had suits depending before them.”* It was afterwards ordained in parliament, in 1346, the time of Edward III. “that all the king’s justices throughout his dominions should renounce and utterly forbear taking any pensions, fees, or any sort of gratuities, which before they used to receive, as well from lords spiritual and temporal as others, that so their hands being free from corruption, justice might be more impartially and uprightly administered.”† A variety of striking instances of the venality and malpractices of the judges during the 16th and 17th centuries are collected by Luders in his *Law Tracts*.‡ One of the last instances on record of presents being made to the Common Law judges are two which occurred to Lord Hale. It is said “that he insisted on paying a man for a buck as he had a suit before him; and at Salisbury, the dean and chapter having, according to the cus-

* Hansard’s Parliamentary History, vol. i. p. 38.

† Id. vol. i. p. 111.

‡ Luders’ *Law Tracts*, p. 104—140. *Commons’ Journals*, vol. x. p. 22 & 23. *Barrington on the Statutes*, p. 23.

“ tom, presented him with 6 sugar loaves in his
“ circuit, he made his servant pay for the sugar
“ before he would try their cause.”* The sale of
offices in Chancery by the Lord Chancellor continued much later. The impeachment of Lord Macclesfield for the sale of masterships is matter of historical notoriety, and it redounds greatly to the credit of Lord Cowper, that so late as 1706, he was the first Chancellor who refused the annual presents made on new year’s day to the person who held the seals by those who practised in Chancery, and which amounted to no less a sum than £1500 a year.†

To the honour of the judges and the state of society in the times in which we live, pecuniary corruption is not now an offence which is reasonably to be apprehended. But that species of it which consists in yielding to the wishes or solicitations of courtiers and powerful private persons, is not less degrading, or less anxiously to be guarded against. In England it was long practised regularly and avowedly. The Duke of Buckingham’s letters to Lord Bacon show that he had solicited that great man repeatedly. The usage continued under Charles I. which led to the following admirable observations of Lord Clarendon on the agitation created in the public mind by the subserviency of the judges to that monarch in his attempts to enforce the payment of ship money. “ But when

* Burnet’s Life of Sir M. Hale, p. 62.

† Burnet’s Hist. of his own Times, vol. iv. p. 141.

“ they saw in a court of law (that law that gave
“ them title to and possession of all they had)
“ reasons of state urged as elements of law;
“ judges as sharp sighted as ministers of state, and
“ in the mysteries of state; judgment of law
“ grounded upon matter of fact, of which there
“ was neither inquiry nor proof, and no reason
“ given of the payment of the 30 shillings in
“ question, but what included the estates of all
“ the standers by; they had no reason to hope
“ that doctrine or the promoters of it, would be
“ kept within any bounds, and it is no wonder
“ that they, who had so little reason to be pleased
“ with their own condition, were no less solicitous
“ for or apprehensive of the inconvenience that
“ might attend any alteration.” He subjoins,
“ And here the damage cannot be expressed,
“ that the crown and state sustained by the de-
“ served reproach and infamy that attended the
“ judges, by being made use of in this and like
“ acts of power; there being no possibility to
“ preserve the dignity, reverence, and estimation
“ of the laws themselves, but by the integrity
“ and innocency of the judges. And no question,
“ as the exorbitancy of the House of Commons in
“ this next parliament, proceeded principally
“ from their contempt of the laws, and that con-
“ tempt from the scandal of that judgment; so
“ the concurrence of the House of Peers in that
“ fury, can be imputed to no one thing more,
“ than the irreverence and scorn the judges were
“ justly in, who had always been looked upon

“ there as the oracles of the law, and the best
 “ guides to assist the House in their opinions and
 “ actions; and the Lords now thought themselves
 “ excused for swerving from the rules and cus-
 “ toms of their predecessors, (who in making and
 “ altering of laws, in judging of things and per-
 “ sons had always observed the advice and judg-
 “ ment of those sages,) in not asking questions of
 “ those whom nobody would believe, thinking it
 “ a just reproach upon them, (who out of their
 “ courtship had submitted the mysteries and diffi-
 “ culties of the law to be measured by the stand-
 “ ard of what they called *general reason*, and ex-
 “ plained by the wisdom of state,) that they
 “ themselves should make use of the licence
 “ which others had taught them, and determine
 “ that to be law which they thought to be reason-
 “ able or found to be convenient. If these men
 “ had preserved the simplicity of their ancestors;
 “ in severely and strictly defending the laws;
 “ other men had observed the modesty of theirs;
 “ in humbly and dutifully obeying them.”*
 Burnet says that Charles II. used to solicit
 the judges both for plaintiffs and defendants,†
 and it is mentioned by him in his life of Sir
 M. Hale, “ that he would never receive private
 “ addresses or recommendations from the great-
 “ est persons in any matter in which justice
 “ was concerned.”‡ Though this practice has

* Clarendon's History of the Rebellion, vol. i. p. 108. 8vo. Ed.

† Burnet's History of his own Times, vol. ii. p. 14.

‡ Burnet's Life of Sir M. Hale, p. 60.

been discontinued among us since the Revolution, Barrington declared in 1775, " That England was " perhaps the only country in Europe where the " judges are not solicited in the face of the sun."* It is to be hoped that it does not so universally prevail now as it is alleged to have done then, though it is to be feared that in many parts of the continent it was a well known custom till a comparatively recent period. In this country corrupt influence can scarcely be exercised over a judge, except in two instances, in the causes of persons whom the king or government personally favour, or whose individual condemnation they desire from motives of political animosity. This sort of bias may exist in all ages and under all governments, and nothing but the moral character of public authorities and the known integrity of the judges can furnish any sufficient security against it. " On ne le tentera pas, à la vérité, par l'appât " grossier d'un vil et honteux intérêt. Une tentation si basse, réduite à se cacher dans les " tribunaux inférieurs, éloignés de la lumière du " sénat, respectera l'élévation du magistrat supérieur; et, à Dieu ne plaise que nous fassions " rougir ici sa fermeté, en lui proposant une victoire si peu digne d'elle. Mais, rejettera-t-il " avec une égale indignation ce poison mieux préparé que l'ambition lui présente; et, aura-t-il " la force de ne jamais boire dans cette coupe " enchantée qui enivre tous les héros de la terre ?

* Barrington on the Statutes, p. 23.

“ Parlons sans figure : ne sera-t-il point du nom-
“ bre de ces magistrats qui aiment la justice, mais
“ qui aiment encore plus leur fortune ? Tant que
“ ces deux mouvemens, qui partagent leur cœur,
“ n’ont rien de contraire, ils suivent sans effort le
“ penchant naturel qui les porte à la vertu ; mais
“ bientôt le hasard fait naître une de ces causes
“ destinées à éprouver la fermeté du magistrat.
“ Un vent de faveur s’élève, et répand un air con-
“ tagieux jusque dans le sanctuaire de la justice.
“ Non que la timide vertu du magistrat passe en
“ un moment jusqu’à l’odieuse extrémité de sa-
“ crifier sans horreur son devoir à sa fortune :
“ mais tel est, si l’on n’y prend garde, le progrès
“ insensible des mouvemens du cœur humain. Un
“ désir secret de trouver le bon droit où l’on voit
“ le crédit, s’élève dans l’ame du magistrat. Il ne
“ se défie point d’un sentiment où il ne voit en-
“ core rien de criminel, et dont il se flatte qu’il
“ sera toujours le maître. Cependant il se fami-
“ liarise avec ce désir ; il se prête avec plaisir à
“ tout ce qui le favorise ; il écoute avec une espèce
“ de répugnance tout ce qui paroît le combattre ;
“ s’il ne décide pas encore suivant l’inspiration
“ secrète de son cœur, il veut douter au moins,
“ et souvent il a le malheur d’y réussir. Mais,
“ dans ce doute recherché, l’esprit défend mal
“ celui que son cœur a déjà trahi. La balance
“ de la justice échappe enfin des mains du foible
“ magistrat ; il veut être ferme, ou du moins il
“ croit vouloir l’être ; mais il ne l’est jamais ; et,
“ toujours ingénieux à trouver des raisons pour

“justifier sa foiblesse, il ne trouve point d’occasions où il se croie obligé de faire usage de sa force.”* The conduct of George III. on his accession to the throne, in intimating a desire to make the judges independent of the demise of the crown, deserves distinguished commendation. If it does not do all that can be wished, it does nearly as much as the sovereign could accomplish, and both the sentiments by which the measure was dictated and those with which it was received, created an effect upon the public mind which will not soon cease to operate. The object which the sovereign had then in view, had the merit of being both wise and patriotic. Of all the odious characters that can be named, a time-serving judge is the most detestable. It is said to have been an exclamation of Lord Hale’s, that twelve red coats in Westminster Hall could do more mischief to the nation than as many thousand in the field.† Whatever might have been the case in Lord Hale’s time, none such could occur now. In a country where jury trial is instituted, and juries are bold enough to do their duty, there cannot be a greater error than to suppose that a political judge can ever make a useful tool. The very reverse approaches more nearly to the truth. “I have heard him say,” it is observed by Lord Keeper North, “that while Hale was Chief Baron of the Exchequer, by means of his great learning,

* Œuvres de D’Aguesseau, tom. i. p. 189. 15me Mercur.

† Maddock’s Life of Lord Somers, p. 273.

“ even against his inclination, he did the crown
“ more service in that court, than any other in his
“ place had done, with all their good will and less
“ knowledge.”* The conduct here described will
always meet with a similar result, and nothing
can be more weak, as well as unprincipled, than
to suggest that judges ought ever to be blamed
for not having sufficiently exerted themselves to
procure the conviction or acquittal of those for or
against whom government is presumed to feel an
interest. The judge who without fear or favour
firmly discharges his duty between party and
party, or between a subject and the crown, will
invariably prove most serviceable to every admi-
nistration. He will, as happened in the case of
Lord Hale, obtain more verdicts for the crown,
and give greater satisfaction to the public. By
uniformly respecting, honouring, and rewarding
the integrity of the judges, the government will
best consult its own stability as well as the good
of the country. In order to this it has frequently
been supposed, that the independence of the
judges would be still greater if they never were
removed from one court to another, nor allowed
to occupy any higher place in it than that to which
they were originally preferred. This might have
its use; but as a general rule, the disadvantages
would perhaps preponderate over the benefits.
A puisne judge on the death or advancement of a
Chief Justice may be the best successor that can

* North's Life of Lord Keeper North, vol. i. p. 113. 8vo. Ed.

be found, and may be less likely to become a time server, than a person who from a private station is at once put at the head of the court, whom the crown or the government has still the power of tempting by so many other allurements. The lofty and independent character which all who are elevated to the rank of judges, ought to be known to possess, seems to afford a more general as well as effectual security against undue partiality, than any check of this description.

The last and most dangerous, because most secret judicial influence which ought to be guarded against, is that which arises from the judge's own prejudices and prepossessions. It is impossible to enumerate the varieties of these which may spring up in the human mind. They may influence him with respect to parties, practitioners, classes of causes, and even his own legal opinions. There is no occasion on which he may not be mislead by them, but most easily where he is the only judge in the court in which he sits. It is the fear of the existence of this concealed source of irregularity, which makes it so desirable for those by whom judges are appointed, to be well acquainted with their real character. A patient and correct cast of understanding is a judicial qualification, scarcely less essential than capacity and knowledge. To check the peculiarities or inequalities in legal opinions, to which a judge may give way in his judgments, it is desirable that he should as far as possible refer them to some controuling general principle. This is

more necessary to be done in courts of Equity in England, than perhaps in any other known tribunals. Not only does the judge enjoy great latitude by sitting alone, but it is much increased by the nature of the causes which he is called upon to determine. Where the judgment is made to proceed entirely on special circumstances, it is easy for a judge without supporting one bad or overturning one sound principle to decide for any party he may be disposed to favour. However strange this may seem, close attention to the proceedings of courts of Equity will shew it to be true, and it places in the strongest light, the value of that singleness of heart and intention which is so valuable an auxiliary to a judicial understanding.

Having said so much of the qualities which the public expect in a judge, it may now be proper to advert to those marks of attention he has a right to expect from them. The first of these is, to take care that he should not be overlaboured. In order that the labour of judges should not be excessive, it is necessary that there should be a sufficient number of them to discharge the duty which the exigency of the state requires. This must depend on the circumstances of each particular state; and of whatever number of judges courts of justice may consist, the number of courts should be sufficient to dispatch the business which may regularly be brought before them. If there are more than that, the mischief is nearly as great as if they are too few. Of too many judges

France may be quoted as an example. That country has no fewer than 360 tribunals of the first instance, one for each *arrondissement*, and as the number of judges in each of these tribunals varies from 3 to 56, they are sometimes split into separate chambers for the dispatch of business, that of Paris being subdivided into seven. It has also 26 tribunals of the second instance, called *Cours Royales*, the number of judges in which vary from 20 to 50, and these are also as well as the preceding class sometimes separated into several chambers for the dispatch of business, that of Paris being subdivided into five. The *Cour de Cassation*, which serves as the tribunal of third instance for the whole kingdom, consists of a first president, three presidents, and 45 judges, who are again distributed into three sections. As far as an opinion of the judicature of a country can be formed without personal experience of its operation, the number of courts appears to be much too large for the wealth and population of such a territory as France. It seems impossible that so many courts and judges, if properly regulated, should be required to discharge the business which an agricultural and moderately wealthy country of such extent can bring before them. If this is the case they will unavoidably become inefficient ; the number of those who are inefficient will diminish the credit and respectability of the rest, and cause bad judges to be introduced into the judicial body with more facility. If there are too many judges in France the

mistake in England is of a totally opposite tendency. Both in Courts of Common Law and Equity, and especially in the latter, the number of judges is at present altogether insufficient to discharge the current business of the country. There can be no doubt that the names, numbers, and occupations of judges when they have once been settled, and still more when they have become known and endeared to the people, ought as long as possible to remain unsettled. This applies particularly to the 12 Common Law judges, towards whom an extraordinary degree of veneration is manifested in every district of the country. But if their present number is found to be decidedly insufficient to dispatch the increase of business which is created by the growing trade and population of the country, then it would be better to resolve upon such a thorough alteration of the judicial system as would supersede any other for a number of years to come. All comprehensive views seem to have been neglected in every change in the law, whether great or small, which has lately been proposed or effected. In the establishment of courts of Conscience, a separate enactment has been passed for each of the 416 parishes, hundreds or cities, wapentakes, boroughs, hamlets, and liberties, in England and Wales,* to which these local jurisdictions extend. The amount to which they have cognizance seems completely arbitrary. It is of great consequence

* Pratt's Abstract of Acts of Parliament for Establishment of Courts of Requests, p. 243. 247.

that there should be one uniform standard, but in the older acts it extends generally to 40s., in the later acts to £5,* and in one to as much as £10.† It should either not have gone so far, or a great deal farther. Every part of the system of judicature bears marks of unconnected and disjointed efforts. There is no uniformity or consistency in any of its branches. The same defect is visible in its higher departments, and the same want of efficiency, after the new arrangements have been long completed. Within the last ten years, alterations of the most essential sort have been made both upon courts of Equity and Common Law, at the same time that they have proved completely inadequate. A Vice-Chancellor was appointed by 53 G. 3. c. 24. The Chief Baron of Exchequer was empowered by 57 G. 3. c. 18. to sit alone in Equity, while the rest of the Barons continued the former ordinary business of the court of Exchequer. By 57 G. 3. c. 11. one of the judges of King's Bench is allowed to sit in the bail Court while the three other judges proceed with the business of the Court. By the 1 and 2 G. 4. c. 16, the judges of King's Bench and Common Pleas are empowered to hold sittings before and after term at other places than in Westminster Hall: and by 1 G. 4. c. 21 and 25, other judges than the chief justices of King's Bench and Common Pleas are empowered to try jury causes in their absence; or any Justice of the King's Bench

* Pratt's Abstract of Acts of Parliament for Establishment of Courts of Requests, p. 175 et seq.

† lb. 169.

at the request of the Chief Justice may try them at the same time provided the press of business should require it. To all these changes, there are several extremely strong objections. The antient constitution of our courts of justice has been nearly as much impaired as if they had undergone a total transformation: there have already been five or six changes instead of one: the business of the country is not done; and yet the judges continue vastly overlaboured. By no arrangement of business or distribution of the judges can they be enabled to overtake their duty. The great mistake which has all along been committed is, that more is expected of them than human strength and understanding can perform. There are only twelve supreme judges for the administration of Common Law, and three for the administration of Equity, and these are manifestly unable to dispatch the business of their several jurisdictions. Between their sittings in London before term, in term, after term, in the bail Court, in Newgate, at *nisi prius*, and at the Chambers; the two circuits they make throughout England, the third annual criminal circuit, the Common Law judges, with the exception of the Barons of Exchequer, have very few days left throughout the year either for relaxation or improvement. In addition to this, as they are all upon duty at the same time, if it should happen that any of them becomes indisposed, a contract is made with some of the serjeants at law, king's counsel, or barristers, to perform the duties of a judge for a certain

length of time, to the obvious discredit of the whole system of English judicature. It is poor economy and worse policy. It never succeeds to see a man one week on the bench and another at the bar. It is an union of characters which the public neither approves nor comprehends, and in this instance their judgment is right, though they may not always be able to assign the reasons for it. This arrangement is made even more objectionable than there is any necessity for it to be. The best men that can be procured ought to preside as judges, and therefore, if there is any deficiency among them, those barristers ought to be selected who are most likely to succeed to that rank upon the next vacancy. The very reverse however happens. Those who are employed to supply the place of judges who are absent from accident or indisposition, are rarely promoted to the dignity of permanent judges. From this it necessarily follows, either that those judges who are permanent or those who are temporary are not the ablest lawyers at the bar, and whichever of these alternatives coincides with the fact, the public must to some degree suffer. Indeed no two things can be more completely contrasted, than the fatigue of an English Common Law judge now with what it was several centuries ago. Their occupations are thus described by Fortescue:—
“ Scire te etiam cupio, quod justiciarii Angliæ
“ non sedent in curiis Regis nisi per tres horas
“ in die, scilicet ab horâ octavâ ante meridiem

“ usque horam undecimam completam, quia post
 “ meridiem, Curiae illæ non tenentur. Sed placi-
 “ tantes tunc se devertunt ad Pervisum, et alibi,
 “ consulentes cum Servientibus ad Legem, et aliis
 “ Consiliariis suis. Quare Justiciarii, postquam
 “ se refecerunt, totum diei residuum pertranseunt
 “ studendo in legibus, sacram legendo scripturam,
 “ et aliter ad eorum libitum contemplando, ut
 “ vita ipsorum plus contemplativa videatur quam
 “ activa. Sicque quietam illi vitam agunt, ab
 “ omni sollicitudine et mundi turbinibus semo-
 “ tam.”* Their labours subsequently increased,
 and in his time Lord Hale seems to have thought
 them abundantly heavy. Though it is well known
 that he was not a man to decline fatigue unneces-
 sarily, yet “ When Penruddock’s trial was brought
 “ on, there was a special embassy sent to him
 “ requesting him to assist at it. It was vacation-
 “ time, and he was at his country house at Al-
 “ derley. He plainly refused to go, and said
 “ the four terms and two circuits were enough,
 “ and the little interval that was between was
 “ little enough for their private affairs.”† So
 much of that interval which Lord Hale thought
 little, has been gradually pared away, that Lord
 Ellenborough more than once complained, “ that
 “ a chief justice now toils worse than a galley
 “ slave,” and several other judges are so worn
 down by labour that the same observation might

* Fortescue de Laudibus Legum Angliæ, cap. 51.

† Burnet’s Life of Sir Matthew Hale, p. 45.

be applied to them with equal justice. With all this they are unable to dispatch business. It is almost always in arrear in the Common Law Courts in Westminster Hall, and there is almost always a number of causes remaining undisposed of at the end of each circuit. At the very last Autumn assizes in 1824, several important causes are said to have been postponed after very heavy expense had been thrown away in feeing counsel and collecting witnesses, and this for no other reason but because the judges had not time to overtake them. In Chancery, matters are in a still worse predicament both for the suitor and the judge. The labours of the judges are there less various than those of their brethren in the courts of Common Law, but in return they are even more constant and severe. With all this, the delay sustained by the suitor is a great deal more distressing. It appears from the list of causes regularly circulated for the convenience of gentlemen at the bar, that at the commencement of the sittings in the beginning of November 1824, the arrears in the court of Chancery alone, consisted of 400 causes, 120 appeals and rehearings, upwards of 200 exceptions and further directions; and 30 causes which had been fully heard, but in which the judgment of the Court remained undelivered. In January 1825, the arrears before the three judges in the court of Chancery stood thus: 695 causes; 475 lunatic, bankrupt, and miscellaneous petitions; 238 causes upon exceptions and for further directions; 43 pleas and

demurrers; and 126 appeals: making all together 1577 separate subjects for consideration and discussion, and the final settlement of which would be sufficient to occupy the time of the three judges of which the Court consists, for at least three years to come, though no fresh business were to come before them. It appears therefore that the arrears of business in the courts of Equity is steadily accumulating, and that the present number of the judges is utterly incompetent to discharge it. It is by no means desirable that they should attempt to do so. The bold and rapid dispatch of business is at first sight captivating and imposing. It prevents weariness in the spectator, and seems to indicate confidence and capacity in the judges. But business disposed of in this way is seldom disposed of satisfactorily or correctly. It induces judges at Common Law to drive causes to arbitration, and in Equity to send them to a jury, and in both, to decide them when they have been but half examined. It is the duty of a judge to be as little dilatory as he can, but the difficulties urged in argument and suggested by his own mind make it impossible to decide causes with rapidity. "In England," says Burke, "we cannot work so hard as Frenchmen. Frequent relaxation is necessary to us. You are naturally more intense in your application. I did not know this part of your national character until I went into France in 1773. At present this your disposition to labour is rather increased than lessened. In your Assembly you

“ do not allow yourselves a recess even on Sun-
“ days. We have two days in the week, besides
“ the festivals; and besides five or six months of
“ the summer and autumn. This continued un-
“ remitted effort of the members of your Assem-
“ bly, I take to be one among the causes of the
“ mischief they have done. They who always
“ labour can have no true judgment. You never
“ give yourselves time to cool. You can never
“ survey from its proper point of sight the work
“ you have finished, before you decree its final
“ execution. You can never plan the future by
“ the past. You never go into the country, so-
“ berly and dispassionately to observe the effect
“ of your measures on their objects. These are
“ amongst the effects of unremitted labour, when
“ men exhaust their attention, burn out their can-
“ dles, and are left in the dark. *Malo meorum*
“ *negligentiam quàm istorum obscuram diligentiam.*”^{*}
These observations are universally true, and ap-
ply with fully as much force to judicial labours as
to those of any other sort. It is impossible that
the business which now comes before courts of
Equity should be done well if it is done quickly.
The public is apt to imagine that the only labour
of a judge consists in listening to the arguments
which are addressed to him on the bench, and that
he must necessarily be prepared to proclaim his
judgment as soon as these have ended. So far is
this from being the case, that it is only after he has

^{*} Burke's Letter to a Member of the National Assembly.

left the bench that his severest duties are beginning. Documents have then to be read, facts ascertained, and points of law investigated and digested; and if this process is conscientiously performed, his progress never can be rapid. It requires much time and attention thoroughly to understand and estimate the facts of a case; and to the diligence and patience with which this is done, much of the excellence of English judges is owing. Whether oral or written pleadings are most useful for that purpose has lately been very keenly agitated. It is curious that while one of the objects of the commission which was issued in 1823 to inquire into the judicial procedure in Scotland, implied a strong superiority of oral pleading to that which is written, an opinion exactly the reverse should have been expressed by St. Pierre with respect to the merits of the oral and written pleadings which were formerly used in France.

“ Il paroît que les parlemens diminuent tous les
“ jours, et avec raison, le nombre des procès
“ d’audience, pour les juger par la voie du rap-
“ port. La voie d’audience est une reste des
“ mœurs grossières de nos ancêtres, qui pour la
“ plupart ne savoient point écrire. Plusieurs de
“ nos anciens rois, et Charlemagne lui-même, ne
“ savoient pas écrire. Il n’y avoit presque alors
“ que la voie d’audience pour juger les affaires;
“ mais à mesure que l’écriture est devenue com-
“ mune, on a trouvé plus de sureté à juger les pro-
“ cès sur les écritures, que sur les plaidoyers. Les
“ preuves des faits contestés s’épluchent bien plus

“ exactement en lisant et en relisant les pièces produites, qu'en écoutant des avocats qui souvent les embrouillent exprès.” Various other reasons are assigned by him for the superiority of written over oral pleadings, to which he at last adds this question—“ Mais, me dira-t-on, quelles sortes de causes doivent être jugées en audience? Je croi, que nulle affaire sera si bien jugée en audience qu'au rapport.”* And many people will think that his judgment is extremely well founded. A mixture of the two seems best, but in difficult cases both the beginning and end of all judicial proceedings ought to be in writing. Not only ought a judge to have leisure either by written or oral pleadings to make himself acquainted with the bearings of the facts of the case upon one another, but he ought then to prepare his judgment; and when that judgment has been prepared, it ought as expeditiously as possible to be delivered. The time and manner in which judgments are delivered cannot be watched with too much attention. The time ought to be certain, in order that parties and counsel may be present if they think fit; and it ought not to be too long postponed, in order that the principal arguments relied upon may not have escaped the judge's memory. The delivery of the judgment is of greater consequence than it has usually been reckoned. I have known more than one cause in which judgment was given no less than seven-and-twenty

* *Mémoire pour dim. les Procès*, 232—237.

months after the cause was heard, and at last it consisted of nothing more than a simple affirmation of the court below, without either statement or reasoning.* However sound the judgment itself might be, it is not possible, that at such a distance, a judgment so pronounced could be completely satisfactory. But if a judge is to prepare his judgments within a reasonable period, he can neither be expected to be perpetually occupied in hearing pleadings in court, nor in reading papers out of it. In addition to the space which is necessary for the preparation of his decisions, he must have leisure to reflect upon the spirit and state of the system of jurisprudence he is called upon to administer, and also a little *tempus subsecivum* to refresh and improve his mind by general study. If it should be asked how many judges all this would require, the only answer that can be given is, neither more nor fewer than are necessary to dispatch the business. Both suitors and judges have an indisputable claim upon the government of the country that it should be kept up to this number. Suitors have a right to ask that their suits should be determined with all reasonable expedition, and in the exact order in which they are brought forward for adjudication. It is of no consequence to the suitor, whether the delay arises from the want of judges or the system of judicature. If the expense, vexation, or delay of justice is such

* Bligh's Reports in the House of Lords, v. ii. p. 710.

that it amounts to a denial of it altogether, that is a grievance of the extent of which the individual who suffers it is as competent a judge as any other person, and demanding correction as loudly as any act of oppression to which he can be subjected. Judges have a right to ask that it should be corrected also, because they are blamed for not doing that which no individuals in their place could do; because much of what they do must be done insufficiently; and because so much must in some way or other be done, that they continue to be exhausted by their labour.

As judges ought not to be overlaboured, they ought also to be liberally rewarded. That the power of administering justice should ever have been put up to sale, now affords matter of surprise and humiliation. The introduction of this practice into Europe is accounted for by Meyer in the following manner:—"François I. dans un
" besoin extrêmement urgent, pressé par les
" Suisses, auxquels il devait de l'argent, et dont
" il voulait se concilier l'appui pour la guerre des
" Milanais, fut celui qui donna l'exemple de ven-
" dre les charges de judicature. Il créa vingt
" places de conseiller au parlement de Paris et
" trente dans les parlemens de province, et les
" rois ses successeurs ne tardèrent pas à l'imiter.
" Les parlemens refusèrent, dans les premiers
" momens, de recevoir leurs nouveaux confrères,
" qu'ils regardoient, non sans raison, comme des
" intrus indignes de siéger sur les fleurs de lis
" avec des magistrats que ne devoient leurs

“ charges qu'à leur mérite ou à leur naissance :
 “ mais le roi savait faire respecter ses volontés,
 “ et par la suite, tous ou la grande majorité des
 “ magistrats ne retinrent leurs charges qu'à titre
 “ d'achat ou de succession.”* It has lately been
 alleged that this practice was productive of no
 great public inconvenience, and did not lead to
 any private corruption.† On the other hand St.
 Pierre admits the inconvenience, and insinuates
 that at least occasional corruption must have been
 almost unavoidable:—“ On ne peut disconvenir
 “ que ce ne soit un grand inconvénient dans un
 “ état, que l'emploi de juge et le droit de juger
 “ les différens des citoyens soit mis à l'enchère,
 “ et soit donné non à celui qui a le plus de capa-
 “ cité et d'équité, mais au plus offrant et dernier
 “ enchérisseur et au plus riche, quoique dix fois
 “ moins éclairé et dix fois moins équitable. D'un
 “ autre côté c'étoit un autre grand inconvénient il
 “ y a 200 ans, de voir que les juges étoient nommés
 “ à la recommandation des favoris, des maîtresses,
 “ des personnes puissantes et accréditées, qui ne
 “ pouvoient par comparer le mérite de tous les
 “ prétendans, et que ces emplois si considéra-
 “ bles dans l'état étoient donnés non au plus
 “ habile et au plus vertueux, mais à celui qui
 “ par sa parenté et par ses amis ou par son ar-
 “ gent avoit le plus de faveur à la cour, quoiqu'il

* Meyer, *Esprit des Institutions judiciaires des principaux Pays de l'Europe*, tom. iii. p. 293.

† Butler's *Reminiscences*, p. 37 and 38.

“ fût dix fois moins habile, et dix fois moins ver-
 “ tueux. Je prends donc les choses dans le degré
 “ d’abus où elles sont. Je ne me propose pas
 “ d’ôter tout d’un coup un grand abus invétéré,
 “ mais de le diminuer peu à peu tous les jours.
 “ En général à mérite personnel égal, il est plus
 “ à propos pour le bien public, que les riches et
 “ les nobles soient juges que les pauvres et les
 “ roturiers. Le riche peut facilement se passer
 “ de petits présens, le pauvre moins facilement.
 “ Mais c’est un grand inconvénient, que ce soit le
 “ prix seul, qui décide du choix entre quatre con-
 “ currens, et que le plus riche, quoique le moins
 “ propre, pour 100 pistoles de plus, sur 40 ou
 “ 50,000 francs, soit préféré au plus propre. Car
 “ il faut compter qu’entre quatre concurrens, il y a
 “ quelquefois une différence de quadruple en mé-
 “ rite personnel.”* And in another passage of
 the same treatise he gives this very extraordinary
 reason for preferring written pleadings to those
 which are oral: “ Un juge en opinant en particu-
 “ lier et sous le secret dans la chambre du rap-
 “ port, opine avec plus de liberté, parce qu’il
 “ craint moins que son avis soit révélé par ses
 “ confrères.”† It is absolutely impossible that
 the administration could have been incorrupt,
 where secrecy became the protection of a judge’s
 integrity. In this country, and I believe every

* St. Pierre, *Mém. pour diminuer le Nombre des Procès*, p. 226.

† Id. p. 236. and see also 235.

where else, the sale of judicial situations has now ceased. That of ministerial situations in courts of justice still continues in this country, though it is to be hoped it will soon be totally abolished. A judge ought to have nothing to do with the sale of any office, or with fees exacted in his court. There is no reason why the rule should not be extended to the Chancellor, Chief Justices of the King's Bench and Common Pleas, and Chief Baron of the Exchequer. These officers may be as little influenced by the emoluments they derive from these sources as persons in their circumstances can possibly be; but no man, let his rank and character be what it may, is proof against the temptation of interest; and it is far better to evade than resist the suspicion of such a bias. But while it seems manifestly expedient to cut off all indirect sources of emolument, the country should make up its mind to provide an adequate compensation. The able and incorrupt administration of justice must always be so fatiguing and important an office, that judges are entitled to a very high remuneration. In England none of the judges are paid too much, and the greater part of them very insufficiently. The point is one on which extremely various opinions are entertained; but both on account of themselves and their families, there seems much reason for believing that their salaries ought to be as high as their country can afford. Perhaps a good deal ought to depend on the form of government under which they live. In a republic, the salaries

of judges may be much smaller than under a monarchy. In a republic, all consideration depends upon the public station which the individual holds. Neither wealth nor hereditary rank can enter into competition with it. In the United States of North America accordingly, where the duties of judges seem to be extremely well performed, it is said the salaries of the best paid judges do not amount to more than from 800*l.* to 1200*l.* a year. Though the value of money is low in that quarter of the world, this may be quite sufficient where the head of the Government only receives annually about 5000*l.* In a monarchical government on the other hand, where primogeniture prevails, and titles and offices of honour abound, the just demands both on account of rank and salary rise a great deal higher. In the kingdom of France the salaries of the ordinary judges of the lowest courts, or those of the third instance, vary from 1,200 francs a year to 6,000, or from 50*l.* to 240*l.* Those of the Presidents run from 15,000 francs to 36,000, or from 600*l.* to 1440*l.* Those of the ordinary judges of the courts of the second instance, from 4,200 francs a year to 8,000, or from 168*l.* to 320*l.* The Presidents of these courts have a fourth more than the ordinary judges, and the first Presidents from 15,000 francs to 36,000, or from 600*l.* to 1440*l.* In the supreme court, or that of the third instance, the first President has 30,000 francs, or 1200*l.*; the Presidents 17,000 francs a year, or 680*l.* and an ordinary judge 15,000 francs, or 600*l.* The

Chancellor is said to have 180,000 francs a year, or 7,200*l.*, besides 50,000 francs, or 2000*l.* a year for his table. His emoluments all together are said to amount to nearly 300,000 francs a year, or 12,000*l.* a year. Most of these salaries appear to be extremely inadequate in such a country as France, and cannot help exposing the lower ranks of judges to temptations which they must find it difficult to resist. If there were only half the number of judges with double the amount of salary, a stranger would think it more likely to enhance both their integrity and ability. In England the puisne Common Law judges have 4,000*l.* a year each, about 1000*l.* of which is said to be expended in the course of the spring and autumn circuits. The Chief Justice of the Common Pleas and Chief Baron of the Exchequer have 5000*l.* a year each; the Vice-Chancellor 5000*l.*; the Master of the Rolls somewhat more, and the Chief Justice of the King's Bench about 6000*l.* besides fees. The emoluments of the Lord Chancellor as head of the court of Chancery, together with those he derives from the speakership of the House of Lords, are not exactly known. Whatever they are, they cannot be too large, and considering the sums of money which are gained at the bar, and the general wealth and condition of society, the sums which the judges generally receive are surely inadequate to support their dignity. It is not becoming in a judge to be much in public, and he will best consult the reverence which is due to his character by pursuing a private and reserved

course of life. But both for the sake of his family and his own relaxation, as well as to make himself acquainted with the perpetual changes which are taking place in custom and opinion, and to maintain a familiarity with liberal inquiry and discussion, he ought to be enabled by his rank and emoluments to mix occasionally on an easy footing with some of the most considerable persons both in point of rank and fortune in the state. The ignorance which those who appoint the judges sometimes evince both of them and every thing belonging to their order, might and ought to be dispelled by the increase of private and improving intercourse. The present neglect of the splendour which the Chancellor used to maintain, and the interruption of those opportunities of social intercourse which it was supposed to be the duty of his office to afford, have also been injurious to the profession of the law, and particularly to the judges. Unless greater generosity and attention is shewn to them hereafter than has lately been, neither they nor their families will long answer the description given of them 500 years ago by Fortescue, and which till lately they have continued to deserve. “ Unde et
“ hoc genus gratiæ videamus subsecutum, quod
“ vix eorum aliquis sine exitu decedat, quod justis
“ magnæ et quasi appropriatæ benedictionis Dei
“ est. Mihi quoque non minimi muneris divini
“ censetur esse pensandum, quod ex iudicum
“ sobole, plures de proceribus et magnatibus
“ regni hucusque prodierunt, quam de aliquo alio

“ statu hominum regni, qui se prudentiâ et indus-
 “ triâ propriâ, opulentos, inclytos, nobilesque
 “ fecerunt. Quanquam mercatorum status, quo-
 “ rum aliqui sunt qui omnibus justiciariis regni
 “ præstant divitiis, judicum numerum in milli-
 “ bus hominum excedat. Nam fortunæ, quæ
 “ nihil est, istud ascribi non poterit, sed divinæ so-
 “ lùm benedictioni arbitror tribuendum.”* There
 can be no doubt, that the mere augmentation of
 the salaries of the judges will not ensure the con-
 stant supply of the elevated character and attain-
 ments which judges ought to possess. But it is
 equally true on the other hand that it affords the
 best chance of obtaining them, and also of display-
 ing them to advantage when obtained. The bench
 is a post which should be made an object of desire
 in point of profit as well as honour to the first men
 at the bar; and if by stinting the remuneration
 held out to those by whom it is occupied, that
 standard of judicial excellence should be lowered
 which it is so desirable to maintain, an injury may
 be done to the administration of justice which it
 may not be within the reach of future liberality to
 correct.

Next to the effect which the rank and character
 of judges has upon the law, the influence which
 the conduct of barristers and solicitors have upon
 it comes to be considered. Upon this subject
 there is little to be said. Judges and practitioners
 must necessarily, in some degree, act and re-act

* Fortescue de Laudibus Legum Angliæ, cap. 51.

upon one another. No check or stimulus is so good upon a judge as that of a strong bar, and the character of the bar is perhaps still more materially affected by the character and capacity of the bench. This applies particularly to the King's Attorney and Solicitor-General, who when they possess the weight and consequence justly belonging to these places, are scarcely less useful indirectly by acting as a kind of counterpoise to the great judicial officers to whom they usually succeed, as directly by the able discharge of their own difficult and important duties. But though the state of the bar has so great an effect upon the administration of justice, it is more easy to express a wish that it should be maintained pure and enlightened, than to point out any means which can be employed for that purpose. It is said of Lord Hale that "there was another custom among the Romans which he as much admired as he despised their rhetoric, which was that the Jurisconsults were the men of the highest quality, who were bred to be capable of the chief employment in the state, and became the great masters of their law. These gave their opinions of all cases that were put to them freely, judging it below them to take any present for it. Indeed they were the only true lawyers among them, whose resolutions were of that authority, that they made one class of those materials out of which Tribonian compiled the Digests under Justinian. For the Orators or Causidici that pleaded causes knew little of

“ the law, and only employed their mercenary
“ tongues to work on the affections of the people
“ and senate, or the pretors. Our judge thought
“ it might become the greatness of a prince, to
“ encourage such a sort of men and of studies, in
“ which none in the age he lived in was equal to
“ the great Selden, who was truly in our English
“ law what the old Roman Jurisconsults were in
“ theirs.”* Upon that vantage ground we have
never stood, though our lawyers rank higher I be-
lieve than any where else in Europe, and the state
of the law almost precludes a Selden or a Hale from
now rising up among us. “ En Angleterre,” it has
been said, “ la plûpart des Jurisconsultes ren-
“ fermés dans leurs greffes, et ne connoissant que
“ leurs archives, paraissent à peine s’appercevoir
“ du bruit de nos sectes : la loi n’est pour eux
“ qu’une profession.”† Instead of a profession it
is more likely to decline into a trade, from which
degradation it can be rescued by nothing but a
renovation of the system. The more the decision
of causes is governed by mere authority, and the
more the body of the law degenerates into con-
fusion, the more mechanical does the occupation
of a barrister become, and the business will at last
be thrown into the hands of persons who have
lower objects, lower attainments, and act upon
lower principles, than those to whom it was an-
tiently entrusted. If this affected merely practi-

* Burnet’s life of Sir M. Hale, p. 125.

† Annales de Législation, No. 1. p. 64.

tioners of the law it would be of little consequence. But it affects the suitors even more than them. The character which barristers, solicitors and attornies maintain, is the surest guarantee the client can receive, that in the conduct of causes no unnecessary step or dishonourable advantage will be taken, but that both parties will contribute to put them into that train which seems best calculated for bringing their real merits fully and fairly forward for the opinion of the judges. Except by the influence which judges of ability and integrity must always shed around them, and by the amelioration of the law, there seems no other way in which the character of practitioners in courts of justice can be certainly and permanently improved, and encouraging their liberal remuneration. The liberal remuneration of those who practise any art or science is the best method of establishing their integrity and excellence, and it applies to the legal as well as to every other profession. If the effect of competition should ever be to pare down the fees of barristers and solicitors to the smallest sum for which men of considerable quickness and activity could be got to labour, then their character will sustain an imperceptible but essential alteration. They will not continue to hold the same rank in society, nor will their conduct shew them to be entitled to the same degree of confidence. But while it seems to be advantageous to the rank and station of lawyers that the recompense should be liberal which is given to them by their clients

for their services, care should at the same time be taken that as few as possible of these services should be required, and that when they are, the performance of them should demand real skill and judgment. If the state of practice obliges a client to have recourse perpetually to solicitors and barristers, to whom he pays comparatively small fees, to do those acts which almost every man of common sense is capable of doing, and of which when done he neither comprehends the reason nor the value, it will be found by him in the end the most expensive of all the ways of getting justice. A bad system is alike prejudicial to the interest of clients and lawyers; and the surest way of sustaining the character of the latter, is by promoting the improvement of that administration of justice with which they are conversant. This however leads directly to the consideration of the laws themselves, the amelioration of which whether immediately or in its remote consequences, is one of the most effectual means by which the distribution of justice can be facilitated.

SECTION III.

Of the Laws themselves.

IT is to the simplification and amelioration of laws themselves that the improvement in the administration of justice in every country must be mainly owing. Every system of law from time to time stands in need of amendment. No person can recommend the laws of any country to be tampered with rashly or unnecessarily, but whenever a decided improvement can be effected either by the repeal of a bad law, or the enactment of a good one, the opportunity ought not to be neglected. Bad laws ought not to be continued under pretence of their being too trifling or unimportant to be altered. This leads to much practical inconvenience, for an incident is sure to happen at some time or other which exhibits the law in all its deformity and absurdity. It was formerly in the power of any spiritual or temporal peer of parliament to object to any trial which should take place where he was a party, unless a knight was returned upon the jury. This law was evidently unnecessary, and it might have been foreseen would on some occasion prove inconvenient. A bishop was the last person who availed himself of this unreasonable provision. He claimed his privilege in 1750, and in 1751 this

unconscientious act was repealed.* The 18 Charles 2. c. 4. and 30 Charles 2. stat. 1. c. 3. which, in order to encourage the woollen trade, imposed a penalty of £5 upon every clergyman who should neglect to give a note to the churchwardens or overseers of the poor certifying that the provisions of the act had not been complied with, was suffered to continue long after burying in woollen had fallen into universal disuse. It was permitted to occupy a place in the statute book until the immense number of prosecutions which were brought against the parochial clergy of the metropolis, by a common informer, caused it to be repealed by 54 Geo. 3. c. 108., and by one of its provisions all the proceedings then depending under the preceding statutes were declared nugatory, thus rendering it in fact one of the worst of all possible legislative measures, an *ex post facto* enactment. Trial by battle continued a recognised mode of proceeding both in civil and criminal actions, until in 1819 an appeal having been brought against Thornton by the infant brother of a young woman whom he was accused of having murdered, the whole judges of the court of King's Bench narrowly escaped the awkward necessity of being compelled to sit from sunrise to sunset to see this man prove his innocence against the infant's champion. A slip in the pleadings fortunately relieved the judges from such a Gothic mode of doing justice, and the recurrence of such

* 3 Blackstone's Com. 359. By 24 Geo. 2. c. 18.

an emergency was prevented the same year by the 59 Geo. 3. c. 46. which declares “ that the
“ trial by battle in any suit is a mode of trial unfit
“ to be used, and it is expedient that the same
“ should be wholly abolished,” and has abolished it accordingly. The laws which obliged criminal judges to perform the solemn and impressive ceremony of pronouncing sentence upon all criminals capitally convicted, though it was morally certain that the sentence would not be executed, continued until 1823 to be an indispensable part of a judge’s duty, though eloquence and reasoning had long conjoined their efforts to evince its impolicy. And even at this moment when a person is found to have been born *purus idiota*, or by any accident to be reduced to that calamitous situation, the profits of his lands and custody of his person may be given to whomsoever he pleases by the king.* To avoid this, the jury almost invariably find him to be a lunatic and not an idiot, in direct contradiction both to the evidence and the fact. It is also true that where idiocy is found, the prerogative is exercised in tenderness to the subject, but it would be every way better to alter the law than to evade its operation. It was proposed to abolish it along with other vestiges of feudalism upwards of 200 years ago in the 18th year of James I., “ which motion,” says Coke, “ though it proceeded not to effect, yet we
“ thought good to remember it, together with

* 1 Blackstone’s Com. p. 303.

“ these considerations: hoping that so good a
“ motion, tending to the honour and profit of the
“ king and his crown, and the freedom and quiet
“ of his subjects and their posterities, will some
“ time or other by the grace of God by authority
“ of parliament one way or other take effect and
“ be established.”* The wise and generous wish
here manifested by Lord Coke is applicable to
all antiquated and unreasonable laws without li-
mitation or exception. Whenever it happens
that from their own nature, lapse of time, or
change of circumstances, laws are found upon
full and fair investigation to clog or pervert the
course of justice, they ought to be anxiously and
invariably repealed. This is one reason for alter-
ations of the law. The system of the law may also
become altogether so intricate, and the proceed-
ings so burdensome and dilatory, that it may re-
quire almost complete reintegration. The inqui-
ries and proceedings which take place in order to
dispense justice, ought never to be carried beyond
what human life and business will permit. Justi-
nian in decreeing that no cause should last longer
than three years, prefixes to the law the following
preamble, “ *Properandum nobis visum est, ne lites*
“ *fiant pene immortales, et vitæ hominum modum*
“ *excedant, cum criminales quidem causas jam*
“ *nostra lex biennio conclusit, et pecuniariæ causæ*
“ *frequentiores sunt, et sæpe ipsæ materiem cri-*
“ *minibus creare noscantur, præsentem legem su-*

* Coke's 4th Institute, p. 203.

“ per his per orbem terrarum nullis locorum vel
 “ temporum angustiiis coarctantur.”* Muratori,
 of whose treatise on the defects of jurisprudence
 every portion is well worthy of attention, after
 mentioning the anxiety for reformation manifested
 by some distinguished jesuits, such as Cevallos,
 Contzenius, Conringius and Decian, at last sums
 up thus, “ la conclusione di tutto questo si è, che
 “ la soverchia e sterminata lunghezza delle liti,
 “ per tante sottigliezze, giri, e rigiri, inventati
 “ dall’ acutezza de’ causidici, e divenuta un male
 “ familiare dell’ Italia e di tant’ altri paesi Cris-
 “ tiani, e male di sommo incommodo e danno, a
 “ chiunque per sua disavventura dee fare o soste-
 “ ner delle liti.—In somma, la giustizia del mondo,
 “ anchè mirata solamente di questa parte, cioè
 “ dalla lunghezza delle liti, se non comparira un
 “ ingiustizia, almeno sarà da dire, una gran gabella
 “ di chi e forzato di chiamarlo in ajuto.”† “ Tel
 “ fut encore une fois,” says D’Aguesseau, “ le
 “ premier age; l’age d’or de la justice. Ainsi
 “ tous les gens de bien voudroient-ils pouvoir la
 “ rendre toujours; mais combien leurs vœux re-
 “ doubleront-ils, lorsque ils voient la justice déjà
 “ languissante depuis long temps sous le poids de
 “ la forme, expirer presque sous le fardeau encore
 “ plus accablant de ce qu’il en coûte malgré elle
 “ pour l’obtenir! Qui ne sait qu’à présent plus
 “ que jamais, différer la justice, c’est souvent la

* Cod. lib. 3. tit. 1. c. 13.

† Muratori, Diff. della Giuris. p. 111 & 113.

“réfuser! Le bon droit succombe, et il ne plie
 “sous le joug de l’iniquité, que parce qu’il n’a
 “pas reçu une prompte décision. Triste mais
 “digne sujet de tremblement pour tous les juges!
 “Un degré d’attention de plus, un dernier effort
 “de réflexion, auroit peut-être prévenu ce malheur.
 “Le plaideur attendoit le moment de sa déli-
 “vrance; mais cet heureux moment échappe à
 “ses mains déjà prêtes à le saisir, il ne le voit
 “plus que de loin au bout d’une longue et pénible
 “carrière, où ses forces épuisés ne lui permet-
 “tront peut-être jamais d’arriver.”* Montesquieu
 begins his chapter on the composition of laws
 with the following short and nervous general ob-
 servations. “Les formalités de la justice sont
 “nécessaires à la liberté. Mais le nombre en
 “pourroit être si grand, qu’il choqueroit le but
 “des loix mêmes: on donneroit à l’une des par-
 “ties les biens de l’autre sans examen, ou les
 “ruineroit toutes les deux à force d’examiner.”†
 I have placed these different passages together,
 written in distant ages and countries, because the
 remarkable coincidence of thought which prevails
 between them could have sprung from no other
 source than the truth of the melancholy fact
 upon which they are founded. Whenever the
 confusion of the law and tediousness of law-suits
 become excessive it is for the good of the commu-
 nity that they should be corrected, and that cor-

* Œuvres de D’Aguesseau, tom. i. 14me Mercuriale.

† Esprit des Loix, liv. 29. ch. 1.

rection is almost invariably postponed too long, instead of being undertaken too early.

The intricacy of the law may arise from three separate but generally concurring causes, the number and confusion of legislative enactments, the multitude of doctrines recorded in reported cases, and from the accumulating niceties of legal procedure. Of the pains that ought to be taken to correct the first, there can be no question. Swarms of laws are among the greatest plagues that can be sent among any people. The extent to which their multiplication has been carried in England is unparalleled in any other country. The proposed general law on forgery would repeal upwards of 350* separate enactments, and each of the proposed acts of consolidation for the Customs and Excise would probably repeal more than twice the number. When they have been permitted to run to so alarming an excess, it was surely high time to begin to reduce them, and it is to be hoped the reduction will go on until every corner of the statute book has been subjected to this species of purification.

The perplexity arising from the multitude of doctrines contained in reported cases, is perhaps even worse than that arising from the number of acts of parliament themselves. Whenever a vast quantity of judgments are heaped together, all of them possessing a certain degree of authority,

* House of Commons' Report on the Criminal Law of England, 1824. p. 187.

there must be incongruity and contradiction. The reasoning of lawyers is rarely altogether erroneous, and as rarely remarkable for logical precision. It neither consists of a deduction from the acknowledged principles of our nature, nor of an induction necessarily resulting from a combination of indisputable facts. Both judges and counsel are frequently obliged to avail themselves of statutory enactments, analogy, precedents, convenience, and natural justice in the course of the same argument or judgment: and the superstructure must unavoidably partake of the defects and inequality of the foundation. There is no period of the law therefore in any country, in which the deductions of lawyers are free from ambiguity, and in process of time the dicta and decisions which are amassed become so numerous, that they can neither be comprehended nor reconciled. The *Speculum Aureum* of Cevallos consists of 4 folio volumes of discrepancies among laws and lawyers,* and there is scarcely any antient code existing where an industrious man might not reap a similar harvest. Watkins in his treatise on Copyholds says, “ He has been brief, and
“ where the subject permitted him he has endeavored to extract consistency. This he found
“ however was not always even to be hoped for.
“ He found reporter against reporter, and case
“ against case. He found consequences continue
“ when their causes ceased. He found conclu-

* Muratori, *Diffetti della Giuris.* p. 21.

“ sions which followed from premises which
“ once existed, applied to instances in which
“ those premises could not exist. He found ar-
“ bitrary assertion adopted by servility, cherished
“ by prejudice, and at length matured into doc-
“ trines whose law could not be questioned, but
“ whose absurdity was too apparent to be denied.
“ It must not therefore be wondered at, if when
“ so situated he has in some instances left the law
“ in all its *glorious* uncertainty: and to such un-
“ certainty must it always be subject, while we
“ consider common sense as subservient to pre-
“ cedent, and suffer the blunders of one age to be
“ the criteria of right in another.”* Even when
authorities are not inconsistent with one another
they may be remarkably inconsistent with some
acknowledged general principle, or the rules of
natural justice. Here then a question arises how
far succeeding judges are to be bound by what
they conceive to be the erroneous determinations
of their predecessors, and what are the just limits
of that deference to them they are bound to
yield. In words all judges admit the force
of authority, while at that very moment the
direct effect of their own judgment may be to
overturn it. The whole train of our reports shews
that in the law of England this point is as doubt-
ful as it is every where else. Lord Bacon has
said in his *Maxims of the Law*, “there be two
“ contrary faults and extremities in the debating

* Watkins on Copyholds, Preface to v. ii. p. 6.

“ and sifting out the law, which may be best noted
 “ in two several manner of arguments: some argue
 “ upon general grounds and come not near to the
 “ point in question; others without laying any
 “ foundation of a ground or difference or reason,
 “ do loosely put cases, which though they go near
 “ the point, yet being so scattered prove not, but
 “ rather serve to make the law more doubtful
 “ than to make it more plain.” And he afterwards
 declares that he “ did intend expressly to weigh
 “ down authorities by evidence of reason, and
 “ therein rather to correct the law, than either to
 “ soothe a received error, or by unprofitable sub-
 “ tlety, which corrupteth the law, to reconcile con-
 “ trarieties.”* And in his pleading on the statute
 of uses, he mentions that previous to his time the
 usage was “ to expound the statutes by grounds
 “ and diversities; as you shall find the readings
 “ still to run upon cases of like law and contrary
 “ law; whereof the one includes the learning of
 “ a ground, the other the learning of a diversity;
 “ and not to stir concise and subtle doubts, or to
 “ continue a multitude of tedious and intricate
 “ cases, whereof all save one are buried, and the
 “ greater part of that one is nothing to the matter in
 “ hand.”† The opinion expressed by W. D. Evans
 is exactly to the same effect. He observes that
 “ The importance of the preceding observation, as
 “ to the necessity of adhering to previous authori-
 “ ties in matters respecting real property, is

* Bacon's Works, 4to Ed. v. ii. p. 329. † Ib. v. ii. p. 417.

“ very manifest ; but I have often taken the op-
 “ portunity of expressing my wish, that the im-
 “ plicit acquiescence in authority had been con-
 “ fined to such cases as these, and to questions of
 “ mere technical reasoning, in which the decision
 “ of a question one way or the other is indifferent
 “ in its general consequences, and that the
 “ Courts would feel themselves more at liberty
 “ than they do in departing from mere authority
 “ in questions of evidence, of practice, of per-
 “ sonal contract, and obligation ; or where ad-
 “ herence to authority is confessedly repugnant
 “ to the real purpose of justice, and no material
 “ inconvenience would result from the judicial
 “ correction of it ; admitting at all times the cau-
 “ tion with which this principle ought to be
 “ adopted—the presumption in favour of the sub-
 “ sisting doctrine—the inconveniences even in
 “ these cases which may result from the altera-
 “ tion,—and the manifest and evident utility
 “ which alone ought to be deemed sufficient to
 “ authorise the deviation.”* And Luders in his
 Law Tracts has bluntly affirmed that “ no length
 “ of time or legal period of prescription can es-
 “ tablish nonsense or turn it into sense. If the
 “ first case was faulty the addition of a second
 “ will not mend it, nor another and another.”†
 These arguments go far to show, that the obe-
 dience which judges are bound to pay to autho-

* Evans's Statutes, v. i. p. 386—and v. i. or ii. p. 96.

† Luders' Law Tracts, p. 129.

rity ought not to be unlimited, and as it has in fact never been paid, the point of resistance had better be fixed and open rather than remain arbitrary and clandestine. There is no place where dissimulation is more unsuitable than in the administration of justice, and nowhere does it give rise to greater incongruities and inconsistencies. But even though decisions were more uniform and reconcilable than they will ever be found, there is the same objection to the excessive multiplication of them that there is to the multiplication of legal enactments on the same subject. It is always an inconvenience to have a number of rules scattered over a large surface. The mind can neither recollect them in detail, nor is it possible to find any clear and controuling principles which connect them. Yet this is the wilderness in which a mere case-lawyer delights to wander. He can trace them upwards and downwards, quoting them by their names, describing them by their properties, and pointing out all their affinities, diversities, and coincidences. But when a case is fully examined this parade of case-law is most frequently found to be mere dead weight upon the merits of the question. It is the application not the possession of learning which is on all occasions the proof of a really vigorous and comprehensive understanding, and if cases are well applied, a very few of them will usually be sufficient. There is no necessity whatever for one half of that obscure learning in which a large part of the law of England is involved. The turn

which the peculiarities of each case should give to general rules must no doubt be attended to wherever justice is dispensed properly, but pains must also be taken from time to time to widen and deepen these general rules themselves which the distinctions springing up in decided cases have a constant tendency to disfigure and obliterate.

If the number and nicety of the distinctions which come to be sanctioned by courts of justice are unfavourable to the law, they are still more prejudicial to the system of judicature. A certain number of rules of practice are indispensably necessary. Regularity and certainty could not exist without them. But crowds of practical rules, and a punctilious enforcement of them, is one of the greatest evils with which any system of law can be afflicted. The degree to which this is carried in the law of England is surely unnecessary. Nearly one fourth of the cases which are reported are strictly speaking of that description. In a speech delivered by M. Portalis on the promulgation of one of the portions of the French code, he has observed, “ Il est donc nécessairement une foule
“ de circonstances dans lesquelles un juge se
“ trouve sans loi. Il faut donc laisser au juge de
“ suppléer à la loi par les lumières naturelles
“ de la droiture et du bon sens. Rien ne serait
“ plus puéril que de prendre des précautions suffisantes pour qu’un juge n’eût jamais qu’un
“ texte précis à appliquer. Pour prévenir les
“ jugemens arbitraires, on exposerait la société

“ à mille jugemens iniques, et ce qui est pis, on
 “ l'exposerait à ne pouvoir plus se faire rendre
 “ justice, et avec la folle idée de décider tous les
 “ cas, on ferait de la législation, une dédale im-
 “ mense, dans lequel la mémoire et la raison se
 “ perdraient également.—Quand la loi se taît, la
 “ raison naturelle parle encore ; si la prévoyance
 “ des législateurs est limitée, la nature est infinie :
 “ elle s'applique à tout ce qui peut intéresser
 “ les hommes : pourquoi voudrait-on méconnoître
 “ les ressources qu'elle nous offre ? Nous rai-
 “ sonnons comme si les législateurs étaient des
 “ dieux, et comme si les juges n'étaient pas
 “ même des hommes.”* This is strong reasoning
 with respect to any kind of authority whatever,
 but with respect to the accumulation of cases on
 points of practice it is irresistible. Up to a cer-
 tain point the settlement of practice is extremely
 useful, but beyond that the tendency of this sort
 of petty legislation is directly opposite. The
 judgment of man can neither lay down rules for
 all cases, nor the memory retain them, and so
 much difficulty is created by the rules of practice
 with which the law of England is now overbur-
 dened, that it may be fairly questioned whether it
 would not be better that the judges were entirely
 left to their own discretion without any rules of
 practice at all. Lawyers besides, from the mere
 force of custom and the influence of habit, come
 to regard legal learning, refinement, and distinc-

* Code Napoleon et Motifs, tom. ii. p. 16.

tions, not as means to an end, but as an end themselves, though they tend as little to the real advancement of the administration of justice, as the logical subtleties of Duns Scotus and Thomas Aquinas did to the increase of human knowledge. “Ora per quanto,” says Muratori, “dieno nelle trombe per far risonare le glorie della magnifica lor professione, se con occhio d’indifferenza ci metteremo ad esaminar la scienza legale non meno in se stessa che nella pratica, noi troveremo non esser ella dissomigliante da tante altre umane cose, le quali mirate dall’ un canto compariscono con aria di beltà, e dall’ altro di brutezza. Considerate le leggi di Giustiniano, per la maggior parte contengono bellezza col contenere Ragione e Giustizia in se stesse, e un’ ludevolissimo fine, perchè tendente a dare il suo a ciascuno. Ma osservate un poco in pratica queste leggi: che confusioni, che battaglie, che disordini non si mirano ne’ tribunali! Sì bei regolamenti erano fatti per impedir le liti, e queste son cresciute; doveano almeno abbreviarle, e queste non han più fine: E tutto ciò per aver la sottigliezza, la malizia, e l’ intemperanza degl’ ingegni o amanti della novità, o ansanti di vittorie nell’ dibattimento delle cause, e desiderosi di favorir taluno nel decidere, svegliate infinite controversie, piantate dottrine e conclusioni apposte: cosa non difficile, trattandosi per la più di materie conghieturali delle quali manca la certa verità. Non si avvide di questo fiero garbuglio, o non

“ se ne mette pensiero alcuno, chi per sua buona
 “ fortuna quietamente possiede il suo senza liti;
 “ ma chiunque e sottoposto a sì fatto flagello,
 “ ne sente bene, tuttoche ignorante, l'asprezza.
 “ Conoscenti altresì del torbido e burascoso di
 “ queste acque i nostri Dottori, non se ne affliggono
 “ punto, anzi li vedete compiacersi di questo
 “ medesimo ondeggiamento e tumulto, perchè
 “ al rovescio degli altri che ne piangono, perchè
 “ o perdono tutto, o comperano caro quel che
 “ loro resta, ó che acquistano; gli avvocati, pro-
 “ curatori, e giudici per questa via arrichi-
 “ scono, e salgono anche a i primi onori.”*

The love of abstruseness and intricacy here al-
 luded to is no where more remarkably displayed
 than in the Institutes of Sir Edward Coke. More
 propositions are affirmed or denied in them than
 perhaps in any other book which ever saw the
 light. His reasoning, like that of many ancient
 judges, is more hard of comprehension from its
 difficulty than its closeness; and even when the
 reader has arrived at the conclusion, he does not
 always know how he has reached it. The same
 defect is observable also among most of the old
 judges and reporters, and is found prevailing
 among a few lawyers even in the present day.
 With a degree of perverseness not altogether sin-
 gular, they seem unwilling that the world should
 become either wiser or better, and to regard every
 proposed improvement as a reflection cast upon

* Muratori, Diffetti della Giurisprudenza, p. 2.

the understanding and acquirements of them and their predecessors. They look with the same sort of jealousy upon every sort of innovation, which Mirza Ahmak, the physician of the King of Persia, is supposed in the adventures of Hajji Baba to entertain against the Frank who was about to introduce the European practice,—“What do we care about his new discoveries? As our fathers did, so are we contented to do. The prescription that cured our ancestors shall cure us; and what Locman and Abou Avicenna ordained, we may be satisfied to ordain after them.” It has happened accordingly that strenuous resistance has always been made to the improvement of the law in this country; and that it has proceeded more from persons holding offices in the law than from any other individuals.

However extraordinary it may appear, a reference to our history will shew that an indifference to the state of the law has increased with the progress of knowledge and our improvement in every other branch of domestic policy. At an early period, when the constitution of the kingdom was beginning to assume the form it has since preserved, the state of the laws seriously occupied the attention of the king and the legislature. So early as the statute of Marlebridge, we find the preamble of it standing thus:—“In the year of grace, 1267, the 52d year of the reign of King Henry, son of King John, in the utas of St. Martin, the said king our lord providing for the better estate of the

“ realm of England, and for the more speedy mi-
“ nistration of justice as belongeth to the office of
“ a king, and the more discreet men of the king-
“ dom being called together as well of the higher
“ as of the lower estate, by whom it was enacted,
“ provided, agreed, and ordained, that the realm
“ of England, of late disquieted with many trou-
“ bles and dissensions, requireth the reformation
“ of statutes and laws, whereby the peace and
“ tranquillity of the people may be preserved, and
“ wherein convenient remedy may by the said
“ king and his ought to be applied; hath made
“ these acts and statutes underwritten.”* The
preamble to that collection of statutes which
commonly receive the name of Westminster are
couched exactly in the same strain:—“ Whereas
“ of late our Lord the King, in the quinzain of St.
“ John Baptist, the sixth year of his reign, calling
“ together the prelates, earls, barons, and his
“ council at Gloucester, because that divers of his
“ realm were disherited, by reason that in many
“ cases where remedy should have been had,
“ there was none provided by him nor his prede-
“ cessors, ordained certain statutes right neces-
“ sary and profitable for his realm, whereby his
“ people of England and Ireland, being subject
“ unto his power, have obtained more speedy
“ justice in their oppressions than they had be-
“ fore; and certain cases wherein the law failed
“ did remain undetermined, and some things re-

“mained to be enacted that were for the reformation of the oppressing of the people: our Lord the King in his parliament, after the feast of Easter in the 13th year of his reign, at Westminster, caused many oppressions of the people and defaults of the laws, for the accomplishment of the said statutes of Gloucester, to be rehearsed, and thereupon did provide certain acts as will appear here following.”* Many other improvements were made in this reign and that of the succeeding Edwards. The 14 Edward 3. stat. 1. c. 5. makes that admirable provision which the lethargy of subsequent days has suffered to degenerate into a dead letter, by which a tribunal is to be established at the beginning of every new parliament, consisting of one prelate, two earls, and two barons, to hear complaints of grievances and delays of justice in the king’s courts, and with the advice of the chancellor, treasurer, and justices of both benches to redress them:—“Also because divers mischiefs have happened for that in divers courts, as well in the Chancery as in the King’s Bench, the Common Bench, and in the Exchequer, before justices assigned, and other justices deputed to hear and determine, the judgments have been delayed, sometime by difficulty, and sometime by divers opinions of the judges, and sometime for some other cause; it is assented, established,

* Preamble to 13 Edward 1. commonly called the Statute of Westminster the 2d.

“ and accorded, that from henceforth at every
“ parliament shall be chosen a prelate, two earls,
“ and two barons, which shall have power from
“ the King to hear by petition delivered to them,
“ the complaints of all those that will complain
“ therein of such delays or grievances done to
“ them; and are authorised, with the assistance
“ of other persons, to hear and determine them.”

In the reigns of Henry VIII. Elizabeth, and James I. great improvements were made in the law; but it seems superfluous to enter into any further specification of the attempts that have been made for that purpose, as the most cursory examination of the statute-book will afford indubitable evidence of the state of the law having formed in early times a subject of serious concern to the sovereign and the government, and some of the most illustrious names in the law have been most zealous in their support. We see from various passages in the works of Lord Bacon and Lord Coke how anxious they were for its amelioration. Lord Bacon composed several of his treatises for this express purpose; and Lord Coke, whose fame rested chiefly in his own day, as it has done ever since, on the minute technical knowledge and recondite learning he possessed relative to our Common Law, and who on that account might have been predisposed to resist its alteration, shewed himself as zealous for its advancement as his more distinguished contemporary. The name of Lord Hale has been too often mentioned already to make any further mention of his services in this

cause requisite. Of Lord Keeper North it is also said, "that all the while his lordship was chief justice of Common Pleas, and had leisure, he bent his thoughts very much to regulate what was amiss in the law. For it is impossible but in process of time, as well from the nature of things changing, or corruption of agents, abuses will spring up; for which reason the law must be kept as a garden, with frequent digging, weeding, turning, &c.; for that which was in one age convenient, and perhaps necessary, in another becomes an intolerable nuisance." It is added, "he digested his thoughts into the form of a tract, and thereon designed to bring acts of parliament as he had encouragement or opportunity." Still, however, it is generally true, that the great body of lawyers, and of men holding offices in the law, have been hostile to innovation, and phantoms of every kind have been conjured up by them to justify their apprehensions. Mankind have even been threatened with a calculation of the mischiefs which would follow if justice were rendered too cheap and expeditious. No man who has ever seen or heard of the administration of law in any age or quarter of the world, can conceive such a calculation to have been made but in the bitterest derision. Those by whom the courts of justice are frequented will soon perceive, that with her name for ever on their lips, and while her honour seems to be before their eyes, her plainest precepts may be strangely slighted by her own ministers, when serving at her own

altars. If justice is administered well, it never can be done either too cheaply or too quickly. However desirable it is that a litigious spirit should be checked, the paucity of law-suits may become a symptom even more alarming than their superabundance. It shews that people are unwilling to resort to courts of justice under any circumstances, and are either unable or unwilling to vindicate their rights in that place where they ought naturally to be settled. The hopes and fears which have been expressed by lawyers with respect to changes in the law have in general been singularly disappointed. Lord Nottingham is reported to have observed of the 29 Charles 2. c. 3. "that every line of it was worth a subsidy."* So much has it turned out otherwise, that instead of being as it is styled, an act "for the prevention of "frauds and perjuries," it is generally thought to have proved an act for their encouragement. On the other hand Lord Keeper North is said to have "thought that the taking away of tenures would "prove a deep blow to the liberties of the people "of England."† Never was there a more unfortunate prediction. Look only at Lord Coke's Institutes, or any of the books of law reports antecedent to its repeal, and it will be found that this act has done more to relieve the subject, supersede recondite learning, and simplify the law, than any single enactment that was ever sanctioned by legislative authority in England.

* North's Life of Lord Keeper North, v. i. p. 209. 8vo. ed.

† Id. v. ii. p. 161. 8vo. ed.

The resistance made to the abrogation or modification of antiquated laws and forms sometimes proceeds from the prescience which arises from profound reflection, but more frequently from that dread of alteration usually displayed by men of mere mechanical attainments, when it is superinduced upon a naturally timid and contracted understanding. It might have been thought, that if ever an act could be proposed, the obvious utility and security of which would have disarmed all opposition, it would have been the 4 Geo. 2. c. 24. which enacted that all proceedings in courts of justice in England should be in the English language. It was not so however. The bill was resisted in almost all its stages, both in the House of Lords and Commons, and the whole proceedings are so curious and instructive that it may be worth while to lay them before the reader. “February 11, 1731. Two petitions were presented “to the Commons from the Quarter-Sessions held “for the East and North Ridings of Yorkshire, “complaining, That the obliging Grand Jurymen “at the Sessions of the Peace to make their presentations in a language which few of them understand; and the suffering in any of the proceedings of any of the courts of justice or in any “of the transactions of the law, whereby the person or property of the subject may be affected, “the use of a language not intelligible, and of a “character not legible but by the learned in the “law, were great occasions of the delay of justice, and gave room to most dangerous frauds:

“ that special pleadings by their intricacy and dilatoriness rendered the prosecution of the rights of the subject difficult and expensive: that the recovery of small debts as the law then stood was impracticable, and the number of attornies excessive: and praying the House to take these grievances into consideration, and to give such remedy as to the House shall seem meet.”* A bill was accordingly presented to the House by Sir George Savile, “ That all proceedings in courts of justice shall be in the English language.” The report then proceeds in the following words:—“ While this bill was depending in the House great opposition was made to it, and the principal arguments insisted on were, That if the language and writing of the law should be altered and made according to the modern way of speaking and writing, no one would even be at the pains to study that ancient language and writing, which most of our old valuable records are wrote in, so that the use of them would in a few years be entirely lost: That the method of distributing justice was now established according to a most concise and regular form, which must be entirely altered if the language and methods of pleading should be changed: That this would necessarily produce such a confusion, that it would cost many years painful and troublesome application before the new forms could be settled in a certain

* Hansard's Parliamentary History, v. viii. p. 414.

“ and regular course of proceedings ; so that the
“ making of those alterations would occasion
“ greater delay of justice, give more room to dan-
“ gerous frauds, render the prosecution of the
“ rights of the subject more difficult and expen-
“ sive, the recovery of small debts more imprac-
“ ticable, and the number of attornies more ex-
“ cessive than heretofore.” To these objections
it was answered by the advocates of the bill,
“ That though both the language and writing of
“ the law should be altered, there would be no
“ danger of losing the use of our ancient records;
“ because as long as we have any such, there will
“ always be some men who either out of curiosity
“ or for the sake of gain will make it their busi-
“ ness to understand both the language and cha-
“ racter in which they are written, in the same
“ manner as we find among us now, several gen-
“ tlemen who make it their business to understand
“ the language and character of manuscripts much
“ ancients than any of our records : That a very
“ few of such law antiquarians will suffice, con-
“ sidering the little occasion we have in any law
“ proceedings to have recourse to any very an-
“ cient records, and when they are made use of,
“ they often do more harm than good : It being
“ necessary for every nation to have private pro-
“ perty determined and ascertained by a con-
“ tinued possession for a moderate term of years.
“ And as to the set forms of the law, it was al-
“ leged that we had already too many of them,
“ and that they were of opinion, that nothing so

“ much perplexed and retarded the proceedings
“ of our courts of justice as a too nice observance
“ of the established forms: That such forms are
“ generally brought for the sake of new fees to
“ such a bulk by the lawyers of all countries, that
“ every country has found it necessary from time
“ to time to curtail and abridge them: That justice
“ was generally the most speedily and the most
“ impartially distributed in those places where
“ the fewest forms were observed: That therefore
“ they thought the destruction of our law forms
“ was a good argument for the bill instead of
“ being against it, because it would take up a con-
“ siderable time before the lawyers could again
“ perplex the course of justice with a number of
“ useless forms and ceremonies. The bill was af-
“ terwards passed and ordered up to the lords.”*

Next time it is mentioned after going up to the lords, “ The lords in a committee on the
“ English law bill went through the same after
“ debate. Those who were against it alleged,
“ That great difficulties would arise in translating
“ the law out of Latin into English, and instead
“ of being an ease to the people, it might per-
“ haps be the subject of great disputes, and mul-
“ tiply law-suits in regard to the interpretation of
“ English words.” And that the opposition of a
lawyer might not be wanting, Lord Raymond
said, “ that if the bill passed, the law must like-
“ wise be translated into Welsh, since many in

* Hansard's Parliamentary History, v. viii. p. 858.

“Wales understood not English.” To which the Duke of Argyle triumphantly replied, “That the meaning of the law had been long understood by the interpreters thereof—the judges, and would surely be so when translated. That our prayers were in our native tongue that they might be intelligible, and why should not the laws where—in our lives and properties are concerned be so for the same reason?” His grace added, “That he was glad to see that the said lord, perhaps as wise and learned as any that ever sat in that house, had nothing more to offer against the bill than a joke.—The next day the lords passed the said bill.”* Nothing can be more instructive than the whole progress of the discussion which has been now detailed. Nearly three hundred years had elapsed since the 36 Edward 3. c. 15. had enacted that “all pleadings and judgments in the courts of Westminster should be for the future in English;” and notwithstanding the patience with which the nation had waited for the completion of the good work which was then begun, it was assailed with the whole host of arguments which are invariably resorted to when any material improvement of the law is projected.

It is in periods of public agitation, and to reconcile men's minds to a revolution or restoration in the state, that the greatest innovations in the law have usually been made, and they have almost invariably proved successful. The whole course of

* Hansard's Parliamentary History, v. viii. p. 860.

history, and that of our own country in particular, may be vouched in confirmation of the fact. Beginning with the confirmation of Magna Charta in the reign of King John, and pausing successively at the reigns of the first and third Edwards, the usurpation of Cromwell, the restoration of Charles II., the revolution of 1688, and the rebellion in Scotland in 1745, it will be found that more marked ameliorations in the letter and administration of the law took place at those conjunctures than in any other periods of our annals. At present the natural course of events is urging that forward, which it has hitherto required the aid of a political crisis to accomplish. Legislative enactments and reports of adjudged cases are multiplying so fast that the law must soon undergo some signal alteration. With respect to the statutes in particular, one can neither look at their number and size without dismay, nor reflect upon the manner in which they are framed, without apprehension. A fresh volume of them issues from the press every year as large as the entire code of any state in Europe. This alone proves that there must be an error somewhere. No people on earth can require to be so coerced by legislative enactments. If one of these annual Digests should be closely examined, a scene will be found to present itself with which even members of parliament themselves must be astonished. There are so many acts for enlarging—acts for continuing—acts to enable—acts to indemnify—acts for regulating—acts for repealing—acts for making per-

petual—acts to remove duties—acts to rectify mistakes—acts to explain and amend acts; that one half of them only explains the other half, and the explanatory half is not unfrequently itself inexplicable. Whether this arises from the haste or incompetency with which laws are drawn up, or the sort of experimental legislation which is so rapidly gaining ground, it would well become the government seriously to consider whether any stop could be put to the growth of this alarming evil. The Athenian punishment for those who proposed unsuitable laws was this, “*Νομος γαρ, ἢν*
“ ἔαν τις μὴ ἐπιτηδείου θῇ νομον, τὰς γραφὰς κατ’ αὐτῶν—
“ Τὸν γραψάντα νομον ἢ Ψηφισμὰ μετὰ ἐνιαυτὸν μὴ εἶναι
*“ ὑπευθύνον,”** and it is fervently to be wished that some such penalty could be suspended over those by whose undigested attempts at legislation our statute book is burthened and disgraced. There is another of the institutions of that people which we might also borrow with advantage, and that is to have no more than one law upon one subject. “*Τὰς θεσμοθετάς καθ’ ἑκάστον ἐνιαυτὸν διορθοῦν ἐν*
“ τῷ δημοσίῳ τοὺς νομοὺς ἀκριβῶς ἐξετάσαντας καὶ σκεψά-
“ μενου, εἰ τις ἀναγεγραπταὶ νομὸς ἐναντίος ἑτέρῳ νόμῳ ἢ
“ ἀκυρὸς ἐν τοῖς κυρίοις, ἢ εἴπου εἰσὶ νομοὶ πλείους ἑνὸς περὶ
“ ἑκάστης πράξεως. Κἂν τι τοιοῦτον εὕρισκωσιν ἀναγεγρα-
“ φτάς ἐν σάνισιν ἐκτιθεναὶ προσθεν τῶν Ἑπωνυμῶν τοὺς
“ δὲ Πρυτάνεις ποιεῖν ἐκκλησίαν ἐπιγραψάντας Νομοθετάς
“ τὸν δ’ Ἐπιστάτην τῶν Προέδρων διαχειροτονίαν δίδοναι τῷ

* *Petiti Leges Atticæ, lib. ii. Tit. 1.—Argumenta Orat. Demosth. contra Leptinem.*

“*δημῶ, καὶ τοὺς μὲν ἀναιρεῖν τῶν νόμων τοὺς δὲ καταλιπεῖν.*”*

Æschines in his speech against Ctesiphon speaks and reasons on the subject still more distinctly.

“*Ἐἰ γὰρ τοῦτο ἐστὶν ἀληθές, καὶ τοιοῦτον ἔθος παραδεδυκεν ὑμῶν.*

“*εἰς τὴν πολιτείαν, ὥστε ἀκυροὺς νόμους ἐν τοῖς κυρίοις ἀναγεγραφ-*

“*θαι, καὶ δύο περὶ μίας πράξεως ὑπεναντίους ἀλλήλοις, τί ἂν ἐτι-*

“*ταυτὴν εἴποι τις εἶναι τὴν πολιτείαν, ἐν ἣ ταῦτα προσταττοῦσιν οἱ*

“*νόμοι ποιεῖν καὶ μὴ ποιεῖν; ἀλλ’ οὐκ ἔχει ταῦτα οὕτως· μὴ*

“*ὑμεῖς ποτε εἰς τῶσαυτὴν ἀταξίαν τῶν νόμων προβαίητε· οὔτε ἡμε-*

“*λῆται περὶ τῶν τοιούτων τῶ νομοθετῇ τῶ τὴν δημοκρατίαν κατα-*

“*στήσαντι, ἀλλὰ διαρρηδὴν προστεταχταὶ τοῖς θεσμοθεταῖς καθ’*

“*ἑκάστον ἐνιαυτὸν διορθοῦν ἐν τῷ δήμῳ τοὺς νόμους, ἀκριβῶς ἐξετα-*

“*σάντας καὶ σκεψάμενους εἰ τίς ἀναγεγραπταὶ νόμος ἐναντίος.*

“*ἑτέρῳ νόμῳ, ἢ ἀκυρὸς ἐν τοῖς κυρίοις, ἢ εἰποῦ εἰσὶ νόμοι πλείους,*

“*ἐνὸς ἀναγεγραμμένοι περὶ ἑκάστης πράξεως, καὶ τί τοιοῦτον*

“*εὐρισκῶσιν ἀναγεγραφοτάς ἐν σάνισιν, ἐκτιθεναὶ κελεύει προσθεν*

“*τῶν ἐπωνυμῶν, τοὺς δὲ πρυτάνεις ποιεῖν ἐκκλησίαν, ἐπιγραφάντας*

“*νομοθέτας, τὸν δ’ ἐπιστάτην τῶν προέδρων διαχειροτονίαν δίδοναι*

“*τῷ δήμῳ, καὶ τοὺς μὲν ἀναιρεῖν τῶν νόμων τοὺς δὲ καταλιπεῖν,*

“*ὅπως ἂν εἰς ἧ νόμος, καὶ μὴ πλείους περὶ ἑκάστης πράξεως.*”†

This passage proves that the importance of consolidation was as well understood then as it has ever been since, and nothing would have amazed them more than the egregious neglect shewn by our legislature of so plain a duty. Even now the imperfect consolidation which is attempted, leaves nearly half the ambiguity which before existed, and does not display that decided character which consolidation ought to assume. Too much time and pains can hardly be taken in collecting and

* *Petiti Leges Atticæ*, p. 8. † *Æschines adv. Ctesiphont.*

condensing the laws which it is meant to consolidate, but unless consolidation when completed is attended with a repeal of the whole consolidated laws, it will be found to aggravate the inconvenience it was meant to remedy. But consolidation will not remedy another evil now creeping in, which renders every act of parliament a casuistical treatise on the subject to which it relates. Instead of consisting of plain and general legislative enactments for the government of a great nation, most acts of parliament now point out what is to be done in each particular situation with all the minuteness of a prescription for a chemical or manufacturing process. The consequence is, that so many specifications are required; and so many are almost invariably forgotten, that scarcely a single act or deed can be enjoined or forbidden, which is not evaded in the teeth of the most direct intentions of the legislature.

The joint influence of these causes has reduced the law to a state in which it is almost impossible that it should long continue. "The capacity of deciding legal controversies," says Hallam, "was now only to be found in men who had devoted themselves to that peculiar study; and a race of such men arose, whose eagerness and even enthusiasm in the profession were stimulated by the self-complacency of intellectual dexterity in threading its intricate and thorny mazes. The Normans are noted in their own country for a shrewd and litigious temper, which may have given a cha-

“ racter to our courts of justice in early times.
“ Something too of that excessive subtlety, and
“ that preference of technical to rational prin-
“ ciples, which runs through our system, may
“ be imputed to the Scholastic philosophy, which
“ was in vogue during the same period, and is
“ marked by the same features. But we have
“ just reason to boast of the leading causes of
“ these defects, which have in no country I be-
“ lieve been carried to such a length. Hence
“ precedents for adjudged cases, becoming autho-
“ rities for the future, have been constantly noted,
“ and form indeed almost the sole ground of argu-
“ ment in questions of mere law. But these au-
“ thorities being frequently unreasonable and in-
“ consistent, partly from the infirmity of all
“ human reason, partly from the imperfect man-
“ ner in which a number of unwarranted reporters
“ have handed them down, later judges grew
“ anxious to elude by impalpable distinctions
“ what they did not venture to overturn. In
“ some instances this evasive skill has been ap-
“ plied to acts of the legislature. Those who are
“ moderately skilled in the history of our law will
“ easily trace other circumstances that have co-
“ operated in producing that technical and subtle
“ system which regulates the course of real
“ property. For as that formed almost the whole
“ of our ancient jurisprudence, it is there that we
“ must seek for its original character. But much
“ of the same spirit pervades every part of the
“ law. No tribunals of a civilized people ever

“ borrowed so little even of illustration, from the
“ writings of philosophers, or from the institu-
“ tions of other countries. Hence law has been
“ studied in general rather as an art than a
“ science, with more solicitude to know its rules
“ and distinctions, than to perceive their appli-
“ cation to that for which all rules of law ought
“ to have been established—the maintenance of
“ public and private right. Nor is there any
“ reading more jejune and unprofitable to a phi-
“ losophical mind than that of our antient law
“ books. Later times have introduced other in-
“ conveniences, till the vast extent and multipli-
“ city of our laws have become a practical evil of
“ serious importance, and an evil, which between
“ the timidity of the legislature on the one hand,
“ and the selfish views of practitioners on the
“ other, is likely to reach in no long period an
“ intolerable excess. Deterred by an interested
“ clamour against innovation from abrogating
“ what is useless, simplifying what is complex,
“ or determining what is doubtful, and always
“ more inclined to stave off an immediate diffi-
“ culty by some patchwork scheme of modifications
“ and suspensions, than to consult for posterity
“ in the comprehensive spirit of legal philosophy,
“ we accumulate statute upon statute and prece-
“ dent upon precedent, till no industry can ac-
“ quire, nor any intellect digest the mass of
“ learning that grows upon the panting student;
“ and our jurisprudence seems not more likely to
“ be amplified in the worst and least honourable

“ manner—a tacit agreement of ignorance among
 “ its professors. Much indeed has already gone
 “ into desuetude within the last century, and is
 “ known only as an occult science by a small
 “ number of adepts. We are thus gradually
 “ approaching the crisis of a necessary reforma-
 “ tion, when our laws like those of Rome must
 “ be cast into the crucible. It would be a dis-
 “ grace to the nineteenth century if England could
 “ not find her Tribonian.”* That some revision
 is necessary and must at no distant period be
 attempted, many concurring circumstances seem
 to indicate. The spirit prevailing among our own
 people, the improvements in jurisprudence which
 are taking place among our neighbours, as well as
 the chaotic state of the law itself, all point deci-
 dedly towards an approaching change. “ L’an-
 “ cienne croyance dans les traditions et les cou-
 “ tumes nationales est généralement ébranlée.
 “ En un mot le vieux système législatif se trouve
 “ partout plus ou moins profondément miné; miné
 “ par le temps, miné par les évènements, miné
 “ par le travail continu et irrésistible des idées et
 “ des besoins des nouvelles générations. Portons
 “ nos regards autour de nous. Que voit-on? A
 “ Vienne et à Paris, à Londres et à Turin, à Pe-
 “ tersbourg et à Naples, en Suisse, en Allemagne,
 “ à Varsovie, en Amérique, l’on s’occupe de nou-
 “ velles loix, de nouveaux codes, de revision,
 “ d’organisation judiciaire, de procédure, d’écoles

* Hallam’s Middle Ages, vol. ii. p. 190—193, 1st ed.

“ de droit, de la création de nouveaux chaires.” It has been observed in the same dissertation, “ Il y a toujours quelque chose de vrai, dans les “ opinions de la grande masse des hommes occupés des affaires réels de la vie. S’ils désirent, “ ou s’ils repoussent quelque chose, c’est presque “ toujours par le sentiment d’un besoin, qui n’est “ pas moins vrai, quoiqu’ils n’aient pas bien appris “ à le bien définir. C’est leur siècle, leur état “ politique et moral, qui parle à leur insçu par “ leur bouche.”* The truth of these observations no candid inquirer can deny. Within the last fifty years there is scarcely a state in Europe in which vigorous efforts have not been made for the improvement of its laws and judicial institutions. Tuscany, Austria, Russia, Prussia, France, Bavaria, Lombardy, Wirtemberg, and Holland have all been actively employed. When the convulsions which took place in 1820, 21, and 22, in Spain, Portugal, and Naples broke out, the persons by whom these revolutions were carried or supported, immediately proposed the revision of the laws as the most powerful engine they could use to secure the esteem and affections of the people. The principles upon which the codes in some of these countries have been founded, it is neither necessary to eulogise nor defend. Defective or erroneous as they may be, there can be no doubt that almost all of them were improvements upon the systems which they superseded. Be

* *Annales de Législation*, No. 1. p. 65, Geneva, 1820.

this however as it may, the attempt at amelioration which it was found expedient to make, proves the importance which is always attached by the body of the people to the state of the laws under which they live, and that unless something had been extremely amiss in their condition in each of these countries, the renovation of them which was promised would not have been hailed with such deep and universal satisfaction.

The people of this country are prompted to a revision of the law as well by emulation as example. When Lord Bacon said that knowledge is power, he might have added that character is power also. As ignorance disappears, and just notions of the qualities of those objects in which the real dignity of states consists, the influence of character will become more and more predominant. It is a tribute which force and splendour are compelled to pay to real excellence. The communication between different parts of the civilized world has now become too general and rapid, to permit extravagant and unfounded praise or blame of any system of law or its administration to be received in the manner it was during the preceding century. One of the most effectual means of dispelling ignorance and prejudice is foreign travel. Place a person of a strong mind, but with strong national partialities, in a foreign country, and if he enters into free communication and discussion with intelligent individuals, he will find himself for some time both humbled and astonished. In every state through which he passes he will be surprised

to find the public as fully satisfied of the superiority of their manners, customs, habits, maxims, and opinions, as he is of those he left at home; and the state of conflict and inquiry which this occasions, and which cannot be conceived except by those who have experienced it, is one of the best of all schools for learning to reason justly and comprehensively either on law or government. Travelling is now no longer confined to a number of rich and distinguished individuals, who went abroad chiefly to improve their manners and cultivate their taste. It is now applied to a much higher purpose, that of giving and receiving knowledge for the general instruction and improvement of mankind. Every country is now pouring forth multitudes of intelligent men who find their way into every quarter of the globe, who there meet with men of kindred pursuits, and carry back with them exact and extensive information respecting every part of the policy and institutions of the states which they have visited. The number of people to whom this has happened in consequence of the unconfined communication which has taken place all over the world for the last ten years, has greatly abated the arrogant pretensions and overweening conceit with which every man is for awhile disposed to regard the laws and government of his own country. The predominance of reason is causing the dominion of prejudice to become daily more and more restricted. We begin to estimate the laws of other countries and our own according to their real merits, and to per-

ceive that theirs are neither so bad nor our own so good as we had once believed them. They are advancing while we remain stationary, and we are stationary here when we are stationary in no other instance. While in every other art and science we are starting forward with a rapidity unknown in any other place or period, and which has for the time placed our country at the head of the civilized world, in our system of law we have done comparatively nothing. In this state of backwardness regard to our own character will not permit it to continue. It must undergo a revision, and a revision both more extensive and efficient than any to which it has yet been subjected.

There is another motive for the improvement of the law not less strong than either example or emulation, and that is the utility which would attend it. Nothing is stationary in us or around us, and if any sublunary object were, it would be nearly as much affected by the transmutation of surrounding objects as its own. Laws, like those of the Medes and Persians, which change not, are only fit for a rude and unimproving people. Such a system could neither endure great improvement, nor be endured by it. The present rapidly advancing state of Europe in population, and knowledge, and the multiplying relations of society, demand an adaptation of the laws to the exigencies which these circumstances are creating. No better illustration of this can be given than the feudal system. Whatever may

be thought of it in the abstract either with reference to law or policy, it was in many respects well adapted to the times in which it sprung up. It assorted well with the sentiments, habits, and circumstances of the people who were subject to its controul. But all these are now changed, and the feudal system and every thing connected with it has now become as unsuitable as it once was otherwise. Facility of communication, the change in the relative situation of different ranks of men, the varieties of personal property and its vast accumulation, the different sorts of wrongs most frequently committed, and the punishments most effectual for their suppression, all require totally different laws from those which prevailed among our ancestors, and the country suffers and complains from none such having been provided. Blackstone says, “Next to doing right, the great object in the administration of justice is to give satisfaction.”* Whether the administration of justice in England gives satisfaction or not must be determined by every individual according to his means of information. It would be rather unaccountable if it did, and most people will be of opinion that it does not. Almost every art and science has benefited by the discoveries and diligence of the present times, and it would be strange if law were the only branch of theoretical or practical knowledge which proved an exception to the general rule.

* Blackstone's Com. v. iii. p. 391.

There is no reason for believing that it lies under any such malediction. Let sufficient time and pains be bestowed upon it, and it will soon be found that its procedure might be simplified and shortened, and the amelioration of the system itself be made to keep pace with the progress of general improvement.

SECTION IV.

On the best Means by which Improvements in the Law may be suggested and executed.

THE only topic now left, is to consider how the general or partial improvement of any system of law can best be effected, when it is thought expedient to attempt it. A few words will comprise all that it is here necessary to say upon it. If any individual voluntarily undertakes an amendment of the law, or if that task should specially devolve upon him by virtue of the public office which he holds, neither of these is a case to which any observation will here apply. The supposition now made is, that a government wishes to make an improvement in the law, and that the only question is, to how many or what class of persons that duty ought to be entrusted. For minor and constant improvements, regularly appointed officers may perhaps be found most useful. For those of a more extensive nature, one or a few individuals judiciously selected, with power to them to call in

other assistance, will invariably be found more effectual than a greater number. Justinian committed the formation of the Code and the reduction of the Digest to Tribonian alone, who selected nine jurisconsults in the first instance, and seventeen in the second, as his subordinate assistants. Whether the superintendence of such a labour is committed to one man or more, their number cannot well be too limited. It is a work in which the mind of each individual selected should embrace all the parts, and is one of those occasions where in the multitude of counsellors there is hardly ever found wisdom. The mode lately adopted in this country whenever any public work requires to be done, is to appoint a number of commissioners. In 1823 a commission consisting of sixteen judges and lawyers, and all possessed of equal powers, was appointed to inquire into the state of procedure in the courts of law in Scotland, together with the course of appeals from the court of Session to the House of Lords; and another commission consisting of fourteen persons, and composed in the same manner, was appointed in 1824 to inquire into the practice of the court of Chancery, and whether any or what part of the business now subject to its jurisdiction can usefully be withdrawn from it. Whatever the result may be, no plan is less likely to prove effective. In the first place the commissioners are too numerous. The proper execution of a commission of this kind requires that the attention and attendance of each commissioner should be uninterrupted. But to

expect that sixteen or fourteen commissioners, each of whom has a variety of other duties to fulfil, should regularly assemble together, is a most chimerical expectation. Half of them will be found to attend very rarely, or not at all; and of those that do, the one half will either secretly or openly be found to counteract the other. In the next place, it seems a mistake to couple judges and barristers together in such an enterprise. That a barrister should consult on equal terms at three o'clock with a judge before whom he has been pleading at two, is almost impossible. There will be a feeling of inferiority on the one hand, and superiority on the other, of which none of the parties are altogether able to divest themselves. Not only does the admixture of judges and barristers seem to be incompatible, but it seems very doubtful whether judges ought ever to be appointed to act on such commissions at all. It seems highly proper, that judges should have an opportunity of expressing their sentiments on every considerable change projected in the law, either orally or in writing, and in the manner most respectful to their station and agreeable to themselves. If any commission has been appointed, this might be done either before it had begun or after it had terminated its labours, but there seem to be considerable objections to judges acting as commissioners themselves. They are apt to feel a personal interest with respect to the increase or diminution of their own power and authority: that kind of activity and energy which is desirable in

a commissioner, is neither suitable to their age and character, nor to be expected from it: and their own judicial conduct may form a very material part of the inquiry. Upon these grounds it will probably be found, that wherever it is thought expedient to prepare the way for any improvement in the law by the appointment of a commission, a small number of commissioners, and none of them judges, are those alone from whom any important service is to be expected.

It is however only from the appointment of Commissioners of some sort or other, or the creation of new officers either by the House of Lords or Commons, that a material amendment of the law is most likely to proceed. From these Houses themselves little can be looked for. The statute of Edward 3,* which enacted that one Prelate, two Earls, and two Barons should be appointed by the House of Lords at the commencement of every session of Parliament, for the redress of grievances in the law, has for centuries remained a dead letter on the statute book. The House of Commons has in this matter nearly equalled the supineness of the House of Lords. As far as internal policy is concerned, they are better known to the public, the one as a judicial tribunal, and the other as a chamber of taxation and commercial regulation, rather than as branches of a legislature employed in framing general laws affecting the persons and property of the whole subjects of the kingdom.

* 14 Ed. 3. stat. 1. c. 5.

The executive government interferes nearly as little with the state of the law as the Houses of Parliament. Unless some measure comes to be in agitation, where they are pressed by powerful individuals or local interests, or unless some difficulty is experienced in the management of public business or the collection of the revenue, the laws are regarded as of inferior consideration. Every member of the government is besides so overwhelmed with the peculiar business of his own department, that he has no opportunity to reflect upon the general state of the law or the administration of justice. The judges are equally busy, and are besides not much encouraged to turn their attention to such a subject. There is no other person known to our constitution but the Lord Chancellor upon whom every thing which concerns the jurisprudence of the country practically devolves, and the duties of such a supreme magistrate are thus beautifully described by one who eminently possessed and displayed them in his own person. “ *Peu content de cette attention particulière qui se renferme dans le cercle étroit de la cause des plaideurs, la supériorité de son génie lui inspirera cette attention générale qui embrasse l'ordre entier de la société civile, et qui est presque aussi étendue que les besoins de l'humanité. Etre encore plus occupé du droit public que du droit privé ; avoir toujours les yeux ouverts sur la conduite des ministres inférieurs de la justice ; venger le client trompé de l'abus qu'on a fait de sa confiance, et punir*

“ l’avidité du défenseur infidèle, dans le temps
“ que l’équité du magistrat fait éclater le bon droit
“ de la partie ; répandre un esprit de règle et de
“ discipline dans tous les membres du vaste corps
“ de la magistrature ; arrêter l’injustice dans sa
“ source ; et par quelques lignes d’un règlement
“ salutaire, prévenir les procès avec plus d’avan-
“ tage pour le public, et plus de véritable gloire
“ pour le magistrat que s’il les jugeoit :—voilà
“ le digne objet de la suprême magistrature.
“ C’est-là ce qui couronne le mérite de son appli-
“ cation dans le temps qu’elle exerce ses juge-
“ mens.”* Lord Eldon has not thought fit to fol-
low these directions. He came into power at a
conjuncture when the decided change which was
taking place in the texture of society, wealth, com-
merce, and population of the country, indicated
that a greater change in our law and legal insti-
tutions would soon become desirable, than had
taken place at any antecedent period of our
history. Had he prompted, promoted, or super-
intended this great work, the length of his reign,
and extent of his influence, would have enabled
him to bring it almost, or altogether to its com-
pletion, and thus to have left a monument to
his memory, which it falls to the lot of few in-
dividuals to have the power of erecting. Unfor-
tunately for the country and his own reputation,
he has pursued a totally opposite course. Feel-
ing that his strength did not lie in the depth and

* Œuvres de D’Aguesseau, tom i. p. 185. 8vo. Ed. 14me Mercuriale.

comprehensiveness of his general views, so much as in the extent of his acquaintance with the minutiae of precedents and practice, and perceiving also that the surest way of continuing in place is to abstain from all innovation, his love of power combined with his love of superiority, to induce him to withhold from all decided improvements himself, and to look with an unfavourable eye on those which were proposed by others. In this course he has invariably persevered. It can hardly be expected that confirmed habits and opinions should be changed at 75, but it is one of the greatest disadvantages of permitting an aged person too long to occupy the same office, that he is apt to look upon it as a private possession which he is entitled to manage according to his own will and pleasure, instead of regarding it as a public trust, which he can neither conscientiously desire, nor ought to be permitted to retain any longer, than while he is both able and willing to discharge the whole of the duties appertaining to it. It is probable that at this moment Lord Eldon has no conception of the sentiments which are almost universally entertained of his judicial administration, either by the persons who frequent his court, or by those who are capable of judging out of it. He has never heard the truth spoken with that freedom and affection with which it flows from the lips of friends of equal understanding. It is one of his greatest misfortunes that through life he has made age, submissiveness and mediocrity the passports to his favour, and has as studiously kept aloof from men

of liberal and independent minds, as he has kept them aloof from him. There are several reasons, both public and private, why I should have abstained from these observations if I thought I properly could, and there are none of a private nature which could have led me to express them. I never asked a favour at his hands, or met with any fancied incivility or disservice from him, or through his intervention. I am not aware of being actuated by any other motive in giving them publicity, but a conviction of their truth, and a firm persuasion that with all the knowledge, industry and sagacity which Lord Eldon possesses, he is even now grievously hindering the improvement of the law as a science, and has done an injury to it as a profession which is almost irreparable. While he feels no reluctance to testify the sense he entertains of the errors and imperfections of the law and its procedure, with the most unaccountable inconsistency he omits no opportunity of ridiculing and resisting every attempt which is made for its rectification. But there is every prospect that this state of things will not long continue. It is almost impossible that Lord Eldon's opinions can accord with those of his colleagues, to the wisdom of whose policy they are in such direct and manifest opposition, and the government will at length see the indispensable necessity of no longer permitting the obstinacy or procrastination of one man to stand in the way of the wants and wishes of a whole people. The fountains of inquiry and discussion have been opened up: the streams of information which they are sending forth are

augmenting and collecting; and whether he resigns his office or retains it, he must either yield to the current, or with all his doubts and difficulties he will find himself carried away before it.

It is to avoid that precipitation to which this dilatoriness invariably leads, that amendments in the law should be projected long before the adoption of them becomes indispensibly necessary. No new system of law or material alteration in one already established ought to be sanctioned without full and fair examination. It is owing to the haste of Tribonian to do that in three years which he was allowed ten to accomplish, that the Digest exhibits such a mass of incoherence and confusion. To press the adoption of any legislative measure when insufficiently known or imperfectly comprehended is neither wise nor honest. It is to the hurry and confusion in which the laws of England are made that the greater part of their blunders and miscarriages are owing. Scarcely any permanent and important measure can be figured, which ought not, after it has been put into the shape of a bill, to be submitted to the judgment of the public for one year at least, and if it were to undergo a probation of several, it would usually be so much the better. Whenever the government is persuaded that any matter connected with the dispensation of justice requires revision, the examination to which the proposed alteration is subjected, can hardly either be too general, severe or protracted. Above all, it ought to be submitted to the inspection of those who are supposed to be most suspi-

cious of its expedience, or hostile to its introduction. Let such persons report upon it, not in any kind of collective body, but what is invariably much better, in their own words, according to their own plan, and upon their own responsibility. If any objections have been offered, let them be canvassed with candour, temper and patience, and let the fate of the proposal depend upon the result of the ordeal to which it has been subjected. If upon a full investigation it appears that they are not sufficiently calculated to attain the ends proposed, or if they would be accompanied with inconveniences which were overlooked or undervalued, let them be rejected; but if they have endured this test, whatever be their magnitude or importance, I believe that in general the public interest suffers when either timidity or local or individual interest prevents them from being effectually and resolutely adopted.

I have now to solicit the indulgence of the reader for the imperfect manner in which this inquiry has been executed. From its difficulty, novelty, and the variety of topics it has been made to embrace, I have no doubt it is chargeable with many and considerable errors and omissions. These I shall neither be reluctant nor ashamed to acknowledge; and perhaps the public may not judge of them too severely, if the principles I

have advanced and the main purpose I have had in view, be found deserving of its approbation. It has been my endeavour throughout to confine the topics of investigation to those of a strictly practical nature; to proceed as little as possible without the support of antient or modern law authorities; and to introduce no speculations or suggestions tending to undermine or destroy any of our fundamental laws or institutions. I have also anxiously abstained from alluding to individuals or classes of persons as far as has been within my power. This I have found the most ungracious part of the task I had undertaken. It is far from agreeable to be exposed to the risk of giving offence where none was intended, and still more painful to be obliged in the course of argument to make observations which may wound the feelings of those whom we most highly esteem and respect. Had I been as fully aware of these circumstances at the outset as I am now, I should never have embarked in such an undertaking. But I had gone on so far that I was both unable and unwilling to recede, and having resolved to go forward, I had no alternative but to follow truth and fair argument wheresoever they might lead me. This I have throughout endeavoured to do, though to avoid hesitation and circumlocution I may seem to have spoken with less diffidence than the difficulty of the subject in discussion and the state of my own mind demanded. My own opinions I do not wish to retain dogmatically myself, and I disclaim all desire to impose them upon

others. The object aimed at has been to accustom the well informed part of the community in some degree to think and reason upon legal subjects, and to participate more largely than they have hitherto done, in those deliberations which relate to the administration of justice, in which they are so deeply interested. All professions are jealous of the application of general reasoning to their peculiar mysteries, though there is scarcely any art or science which has not derived manifest improvement from it. The law would gain as much by it as any other branch of theoretical or practical knowledge, and the disposition of the public is now favourable to adopt any amelioration of which it may be clearly shewn to be susceptible. That preposterous attachment to the absurdities of our own law, and blindness to the excellences of others, is now effectually removed, and the country is willing to adopt good regulations wherever it can find them.

“ *Majores nostri, Patres Conscripti, neque consilii*
 “ *neque audaciæ, unquam eguere: neque super-*
 “ *bia obstabat, quominus aliena instituta si modo*
 “ *proba, imitarentur. Arma atque tela militaria ab*
 “ *Samnitibus, insignia magistratuum ab Tuscis*
 “ *pleraque sumserunt: postremo, quod ubique*
 “ *apud socios aut hostis idoneum videbatur, cum*
 “ *summo studio domi exsequebantur: imitari quam*
 “ *invidere bonis malebant.*”* No written codes which have prevailed in Europe are positively

* *Salustii Cat. cap. 51.*

bad, and many of them are possessed of high degrees of excellence. It is not in the letter but in the administration of them they are found defective. With the laws of England it is directly otherwise. The administration of law in foreign countries is usually worse than the law, and in England the law is worse than its administration. In every thing which relates to the liberty of the subject, in ensuring a fair trial in disputes which occur between the crown and the subject, and for many of the general doctrines of Equity by which its courts are governed, the law of England cannot be prized too highly. But in many matters of the most frequent occurrence and greatest moment, the more one becomes acquainted with courts of justice and books of law, the more one perceives how widely the arguments there used, differ from those which the unsophisticated understanding of the parties themselves would have employed, and how frequently the decision of the judge is determined by the rules of a species of practical metaphysic, which is protected from the contempt which has overwhelmed that of the Schoolmen, by no other cause than the power which it exercises over the lives and fortunes of those who are subjected to its influence. It is time that this mysticism should be swept away, and that both the letter and practice of the law should coincide with those broad and intelligible principles of equity and convenience, which may recommend them to the ordinary apprehension and approbation of mankind. If I should in any degree con-

tribute to hasten the approach of this auspicious period, whatever the result may be to myself, my end and object will effectually be accomplished. I have always believed that free and unfettered inquiry is among the greatest blessings with which civil liberty is accompanied, and that the exercise of this privilege is neither confined to those who are dissatisfied with the government nor with its administration, but may be pursued without disadvantage by all who sincerely desire to promote the happiness and extend the prosperity of their fellow subjects. Whatever disfavour therefore may be shewn towards me for what I have done, I shall attribute it to my own incapacity, and not to the demerit of the cause which I have here supported. That cause I am persuaded must eventually prove successful. Though I should fail, abler men will follow, and finally achieve that, to the accomplishment of which my powers were unequal. In their success I shall greatly and unfeignedly rejoice, and should this satisfaction from unfavourable times or unexpected accidents be denied me, I shall still be sustained by that last and surest consolation of every one who exerts his faculties of mind or body for the good of the country to which he belongs—the excellence of his object, the fairness of the means employed for its attainment, and the rectitude of his own intentions.

THE END.

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